## United States Court of Appeals for the Second Circuit



## JOINT APPENDIX

# 76-7403

76-7440

In The

## United States Court of Appeals

For The Second Circuit

CONTEMPORARY MISSION, INC.,

Plaintiff-Appellee.

-against-

FAMOUS MUSIC CORPORATION,

Defendant-Appellant.

PARAMOUNT PICTURES CORPORATION and GULF + WESTERN CORPORATION,

Defendants.

On Appeal from the United States District Court for the Southern District of New York.

#### JOINT APPENDIX

HAWKINS, DELAFIELD & WOO Attorneys for Defendant-Appellant 67 Wall Street

New York, New York 10005 (212) 952-4700

WILLIAM D. O'REILLY

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Windham, New Hampshire 02383
(603) 893-0695

PAGINATION AS IN ORIGINAL COPY

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## CIVIL DOCKET

Jury demand dates

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Pleff. 1-9-73. Yes No. 106 Bev. For plaintiff: Sheldon Kleeger, Esq. 10017 PARAMOUNT PICTURES CORPORATION AND CULF + WESRERN CORPORATION For defendant: Schwartz Burns Lesser & Jacoby 445 Park Ave. N.Y.C. 10022 980-320 (Paramount et ano) Hawkins Delafield & Wood 67 Wall St. N.Y.C. 10005 (Famous Music) Clerk J.S. 5 mailed Marshal J.S. 6 mailed Docket fee Besis of Action: Breach of Agreement-Failure to perform Witness fees services as agreed Depositions Action arose at:

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Owen, J.

	4945 Page #4	Date On
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	Court within 10 days of receipt of a copy of this order. In Clark, Court is ordered to transmit a copy of this Order to Father O'Reilly! Quent (mailed notice) Judgment Entered 176,489 - 5-27-76.	17 7h
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3	(majled notice) Before Owen, J. jury trial Legun.	111
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15-12-76	Trial continued.	
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### EXCERPTS TRIAL TRANSCRIPT (pp. 1a-187a)

arjb 2

this went for nought because Famous simply was unable to distribute these records.

Now, when we come back to July 31st of 1974, once again the important thing is everything is sold, they are left with a smaller record company, Crunch records, and once Famous is sold there is no way left to distribute the records any more. The same problem, the entire investment they put into this over a period of more than a year is simply lost.

Now, the law is very clear that where there is a non-assignable contract, that is a contract that cannot be assigned and a company such as Gulf & Western orders its wholly-owned subsidiary, Famous, to sell that division, Gulf & Western, the parent, will be held liable for interferring with the contract between Famous and Mission and they will also be held liable for any damages that reasonably follow from such an action by Gulf & Western.

marily monetary harm and that is what we are talking about in the end. We are talking about amounts of money that were lost by plaintiff Mission because of defendant's actions, the defendant Famous, the defendant Gulf & Westernaand the defendant Paramount, the third defendant, who didn't play as large a role as Gulf & Western but

+ + \*

106 O'Reilly-direct 1 gab-5 Yes, please, Pther. 2 Q "Within the first year of this agreement Famous 3 shall select and appoint at least one person to personally 4 oversee the nationwide promotion of the sale of records 5 That person shall maintain personal contact 6 hereunder. with the Mission personnel and give weekly reports of the 7 progress of such promotion." 8 Did you and Mr. Martell have a conversation 9 with respect to the appointment of a personnel overseer? 10 11 Yes. What did he say and what did you say? 12 MR. LAWLESS: I object to this. This is 13 extraneous, your Honor, irrelevant and immaterial. 14 MR. O'REILLY: It is in no way irrelevant, your 15 16 Honor. THE COURT: What part of this agreement is claimed 17 to be ambiguous in that it requires explanation? 18 MR. O'REILLY: Your Honor, we have contended 19 that Famous failed to --20 THE COURT: Come up here. 21 (Discussion at the bench off the record.) 22 Father O'Reilly, did Famous Music ever appoint 23 a so-called personnel overseer in accordance with Paragraph 24

14 to oversee the promotion of your records personally?

	•	gab-6	O'Reilly-direct	107
	2	A	No, never.	
	3	70	Father O'Reilly, I would like you to	turn to
	4	Paragraph 2	3 of the contract, please. Under Par	agraph
	5	23C, would	you please read that brief paragraph f	or ne
	6	A	"The amount of promotional expenditure	es made *
	7	Actually it	is a continuation of the opening.	as made.
	8		Is that referring to the 50,000 promot	ional
	9	expenditure?		. I Ona I
1(	0	, A	Yes.	
11		Q (	Go on.	
12		, А •	Starting February 28, 1973, and every	Siv monel
13		thereafter Fa	mous shall submit to the Mission the	following
14		information f	or the six-month period ending two mon	the
15		earlier."		
16		<b>"</b> T	hen amount of promotional expenditures	made
17		provided that	this information need not be given af	ter a tot
18		of \$50,000 in	promotional expenditures has been made	
19			d you ever receive such information fr	
20		Famous Music w	ith respect to the expenditur e of \$50	
21		or any amount	less than that or more than that, Fath	er?
22		A No.		
23		Q In	fact, you never received any such star	tement.
24		did you?		1
25		A No.		

1	gab-7	٥٠	Reilly-dir	ect	108	1
2		MR. LAWLESS:	I object	to that	as leading.	1
3		THE COURT: I	t is repet	ition.	Let's put it	
4	that way.					!
5		MR. LAWLESS:	I will of	ject on	both grounds,	,
6	your Honor.					!
7		THE COURT: A1	1 right.			-
8		MR. O'REILLY:	The quest	tion and	answer stand.	i
9		THE COURT: GO	ahead.			•
10		Let's avoid r	epeating	the witne	ess' answer.	1
11		MR. O'REILLY:	Yes, you	ir Honor	•	1
12	Q	Father, did F	amous Mus	ic ever	appoint the eight	:
13	independent	promotion men	which you	ı discus	sed earlier?	,
14	A	No.				
15					there is any-	!
16	thing in th	e contract wit	h respect	to that	, your Honor. Th	ıe
17	witness tes	tified as to s	ome conve	rsation	between himself	•
18	and Mr. Mar					;
19					objection on the	i
20		*			orate the contrac	≥ŧ.
21	I take it t	he answer is -				•
22		MR. O'REILLY:	I am no	t attemp	ting to incorpora	a to
23	the contrac					5
24		THE COURT:	thought	you were	•	1
25		MR. O'REILLY	No.			i

O'Reilly-direct 1 gab-8 MR. LAWLESS: Is he claiming ambiguity then? 2 THE COURT: He is asking whether they ever 3 appointed eight independent people. MR. LAWLESS: They are not obliged to under 5 the contract, your Honor. That is the point. This was 6 the pre-contract discussion stage that I think he is now 7 confusing with the contract itself. 8 MR. O'REILLY: I am not confusing anything, your 9 What I am attempting to do, I am attempting to 10 Honor. show that this whole contract --11 THE COURT: Is this something that did not end 12 up being incorporated in the contract? 13 MR. LAWLESS: Yes, sir. That is the point. 14 MR. AMABILE: That was the basis of my objection. 15 THE COURT: I will sustain that. 16 Father, after the agreement which I have just 17 shown you was signed, Exhibit 2, were there meetings that 18 took place between Famous and Mission with respect to 19 the promotion of the forthcoming rock opera Virgin? 20 Yes. We had --21 A How often did these meetings take place, Father? 22 Q Almost daily. 23 I see. What were the subjects they covered, 24 25 Father?

- Q Fine. What did you say to him, if anything?
- A I said to him that it was -- they were breaking our contract, we had invested hundreds of thousands of dollars, we had signed contracts, they just couldn't arbitrarily sell a company and just literally put us out on the street.

I pulled -- I had one of my contracts, I pulled open the contract and showed him paragraph --

- Q Whatever.
- A Showed him that it could not be assigned, this contract cannot be assigned.

He said, "Don't speak to me about it, go see ABC. They are the ones that it has been sold to."

THE COURT: Was anything else said?

THE WITNESS: If I am to give the whole story just give me time. Don't stop me and I will give the whole picture.

- Q Go right ahead, Father.
- A He also mentioned to me -- I asked him about the promotion expense. He said, "Don't talk to me about that any more, John. My hands are tied, I can't even sign a check." That is what he said to me.

Let's see, I showed him the contract and he said,
"Yes, Father, you do have something there are I hope you do

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1	arjb	O'Reilly - direct 232
2	well with it	or something to that nature.
3	Q No	, Father, as I recall he said you should go
4	to ABC. Did	you go to ABC thereafter?
5	A Ye	s, I did go to ABC.
6	Q Wh	en did you first contact ABC?
7	A I	contacted them about 15 minutes after I spoke
8	to Mr. Marte	11.
9	Q Wa	s that by telephone or in person?
10	A By	telephone, I called.
11	Q Wi	th whom did you speak at ABC?
12	A I	spoke to Mr. Len Korobkin.
13	Q Do	you know what position Mr. Korobkin held in
14	ABC?	
15	A Or	e of the attorneys at ABC.
16	Q PI	ease relate to the jury the substance of the
17	conversation	between yourself
18	МІ	. AWLESS: That is well beyond the claim.
19	ABC is not a	party here.
20	TI	E COURT: Suppose you come to the side bar,
21	gentlemen.	
22		at the side bar.)
23	T	HE COURT: What makes this admissible, talking
21	to some law	ver who probably really doesn't know very much
25	about it an	speaking as a lawyer and what makes this
	n .	

arjb

O'Reilly - direct

admissible from a man who is not employed by Famous?

MR. O'REILLY: The reason is, your Honor, because we have as part of our damages indicated we spent money in mitigation of damages.

In other words, what we were trying to do, as soon as we found out that Famous was not going to have anything to do with this and had passed everything onto ABC, we tried to get to ABC to see if there was some basis for this record to continue to move up the charts.

Father O'Reilly took a trip out to the west coast in an attempt to work out, resolve the problem.

Now, we are claiming that these expenses associated with this would be in mitigation of that. During this conversation an appointment had been made to go out to the coast about a week later or so. I have forgotten the time frame.

During that initial conversation the fact was discussed and the fact that Father O'Reilly should come to the west coast was discussed and that is why we have this conversation.

THE COURT: Can it be stipulated so we don't have to go over a completely inadmissible thing, that there was a phone conversation with a lawyer from ABC at which time an appointment was made to go somewhere else?

1	arjb O'Reilly - direct 234
2	MR. LAWLESS: If he wants to stop there, fine.
3	MR. O'REILLY: Mr. Korobkin will be called by
4	the defense. He is on the witness list.
5	MR. LAWLESS: He is on the witness list I can't
6	assure you that he will be.
7	THE COURT: If that is all you want on that phone
8	call
9	MR. O'REILLY: Exally.
10	THE COURT: There is no problem.
11	MR. LAWLESS: If that is the end of it.
12	MR. AMABILE: We would stipulate and put the
13	stipulation on the record.
14	MR. O'REILLY: We can pass by the phone conver-
15	sation and go on to
16	MR. LAWLESS: He wants to go further.
17	THE COURT: What happens from here in terms of
. 18	testimony?
19	MR. O'REILLY: What happens is that I assume
20	I assume I am making an informal offer of proof at this
21	
22	
23	
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2	ing is what happens is that Father O'Reilly voes to the

arjb

west coast and meets with Mr. Korobkin and Mr. Korobkin indicates -- at first he is very much interested in the song after he heard the song Fear No Evil and he personally indicated he thought it was an excellent song and went upstairs to speak to the president or vice president of the company.

When he came down he told Father O'Reilly that ABC was not interested in picking up any parts of the Virgin-Crunch agreement and would have nothing to do with them.

As you recall, one of the arguments we are making is that Famous had no right to assign these contracts anyway but even if they did, ABC did not pick them up and ABC did not choose to honor the contracts.

Therefore, Famous was still bound under the contracts.

MR. AMABILE: That is not in the pleadings.

THE COURT: Where is the contract? Somebody have a copy of it?

(Handed to court.)

MR. O'REILLY: Paragraph 29 deals with assignability.

THE COURT: Gentlemen of the defense, it would seem to me he is entitled to get into this conversation.

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MR. AMABILE: May I be heard on that?

THE COURT: Under the clause of the agreement.

MR. AMABILE: That is one of the questions we raise on our argument for summary judgment but there was no theory that was raised in the pleadings of this lawsuit that would permit recovery against the assignor because the assignee breached it.

The only thing I gather is that the assignor did not breach the contract, not that somebody else breached it and that the assignor is then derivatively liable.

That is a new claim and that is one of our arguments --

THE COURT: I'm not sure I follow you.

MR. AMABILE: Under the claim as it is now being raised by the plaintiff, the assignee ABC breached the contract and therefore --

THE COURT: No.

MR. O'REILLY: That is not the claim at all.

THE COURT: The claim is that, passing the question of whether you had a right to assign this in the first place, it was a condition of the assignment that the assignee agreed to be bound by the obligations of the agreement. He is going to put in proof that the assignee rejected the agreement.

MR. AMABILE: I submit that an agreement between

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ABC and Famous contains a commitment by ABC to be bound by the agreement. That satisfies this condition.

MR. O'REILLY: No, it doesn't, your Honor.

MR. AMABILE: Let me finish. If subsequently ABC did something it should not have done plaintiff should have sued ABC.

THE COURT: But is there delivery of an execution and delivery to Mission of an agreement by which ABC agreed to be bound? Show me in that agreement that ABC states that there is an agreement to be bound.

(In open court.)

THE COURT: Ladies and gentlemen, what we are dealing with involves matters of law as to whether certain evidence is legally relevant and appropriate for you to consider. I am now making a determination whether it is or isn't and then we can go forward with that part so that the decision has to be made whether or not there are certain matters which should be called to your attention or whether they are proper for you to consider; or whether they are matters that in my judgment you should not consider. That is what we are doing here. We are not keeping things from you except in a legal sense that I have a duty to rule on these matters first to determine whether you ought to hear them as part of the overall issues presented to you.

O'Reilly-direct

gab-1

MR. AMBILE: This was marked on a deposition.

It was this paragraph, your Honor (handing).

THE COURT: Mr. Amabile, you draw my attention only to Paragraph (b)?

MR. AMABILE: Yes, wherein it says that the buyer assumes all obligations in the contracts which are delivered herewith. I am paraphrasing it.

MR. O'REILLY: Are you reading him the whole -
MR. AMABILE: No, I am paraphrasing the agreement

MR. O'REILLY: Does (c) also have anything to do

with it, 2(c)? Would that be pertinent?

THE COURT: I must confess that unless you can show me where, I do not see that this Paragraph (b) of the assignment to ABC fairly meets Paragraph 29 of the original.

MR.O'REILLY: One other point which is very important here. That contract, your Honor, was first given to us in 1975, more than seven months after the time frame that we are talking about and more than four months after the lawsuit was commenced. It was given as part of the deposition, discovery.

MR.AMABILE: The contract says, "The buyer will, and does hereby, assume" -- and I am leaving out something -- "assume all of the liabilities and obligations of seller

gab-2

O'Reilly-direct

disclosed on the balance sheet, summaries furnished in support thereof, the actual contracts, agreements and other documents delivered to buyer."

I am not quoting now. ABC assumed all obligations under the contracts delivered to it by Famous. Among the contracts delivered to it by Famous was the contract between plaintiff and Famous.

So that ABC by this clause, your Honor, assumed all of Famous' obligations to plaintiff.

Mr. O'Reilly has indicated that the original contract was not delivered until after --

THE COURT: Nothing was delivered to him, he said. No contract whatever.

MR. AMABILE: There was certainly an oral communication which put them on notice that ABC had assumed. We just heard that testimony.

THE COURT: That does not meet Paragraph 29 either MR. AMABILE: If we realize that the purpose of the last condition in Paragraph 29 was only a notice provision and that plaintiff himself has agreed, has just testified from the witness stand that he had obtained notice of the sale and of ABC commitments, the import of that paragraph has been satisfied by the parties.

Tony Martell told him about the ABC sale the

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Would you complete the conversation by --THE COURT: No. I take it at this point,

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I went out there and then alled THE WITNESS: up for an appointment and spoke to Mr. Stark of ABC.

O'Reilly-direct

THE COURT: All right.

Do you want to continue? 0

I went out there about -- almost a week after I spoke -- the first call to Mr. Korobkin because Mr. Korobkin told me --

I don't want to get THE COURT: Please. into that.

I came out there approximately a week after the A company was sold. I called Mr.Stark on the telephone. Actually I called for J. Lasker, who is the president. Mr.Start got on the phone, who is the vice-president, and he sid, "Oh, how are you, Father? I am very happy to talk to you."

I said to him, "Well, I am out here regarding" -we were with Famous Music. He says, "Oh, yes, I know all about it. We have got Fear No Evil and our men are out there promoting the record already, Father."

> I said, "Oh, really?" He said, "Yes."

I asked if I could come over to speak to him. He said he wouldn't be available to speak. So I then called up Len Korobkin, whom I had

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who previously. I went over to see Len Korobkin in his office. I asked Len Korobkin -- I said, "I just was talking to this Mr.Stark and he told me that you people are already on this record, got it out and promoting it. That is a little hard to believe."

He started laughing.

He said, "Don't mind him."

He said, "Let me see the record."

So I gave him the record and he played the record.

He told it was a great record. He brought it, Fear

No Evil, to some people in his publishing division and

he played the record for them. They thought it was a

great record. They said so to me.

He then said, "Wait here."

He took the record up the stairs to the executive offices, came down about five or six minutes later and says "Our company want no part of this and we want no part of the whole arrangement with you people."

- Q What was the whole arrangement, Father?
- A No part of any contracts of ours.

THE COURT: This is what he said to you? What did he say to you?

THE WITNESS: He sid, "We want no part of this. We don't want to touch cruch." Those were his

O'Reilly-direct exact words. He said he never saw -- I showed him the amended contract showing that we are co-owners of Virgin. He said he never saw those contracts, they weren't aware of those, he told me. He told me he didn't want any part of Virgin. He didn't want any part of it. I said to him -- how did he put it? I am trying He said, "It's no use wasting your time with this company. We are a big company. We have over 500 albums a year we put out. We got our own promotion departments. We didn't even want Famous Music." He told me that it was a deal made by the people THE COURT: Wait. We are only discussing his relationship with you, and his observations about anything else are irrelevant to the jury's consideration. It only He told me they weren't interested and, in fact, they weren't interested in the majority of Famous music product. They only wanted Dot records. I said to him, "What about all our records? understand you people have taken all our records off the

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11	20a
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1	gab-8 O'Reilly-direct
2	He said, "Business is business, Father. You
3	have to learn that. Business is business. I am here to
4	clean up"
5	THE COURT: Wait, wait.
6	MR. LAWLESS: Move to strike all of this.
7	THE COURT: Strike all of this out.
8	Counsel come up here, please.
9	(Discussion at the side bar off the record.)
10	THE COURT: It is established that ABC raid
11	they weren't going to have any relationship with your company
12	THE WITNESS: Yes.
13	THE COURT: Right?
14	THE WITNESS: Yes.
15	THE COURT: That's it. Let's go on to another
16	subject.
17	Ladies and gentlemen, it is only the fact that
18	is important. The expressions of comment of somebody
19	at ABC are not for your consideration.
20	Q Father O'Reilly, did you hear or did you become
21	aware that records of Contemporary Mission, namely Virgin
22	and Crunch recordings, were being taken off the market?
23	A Yes, I did.
24	Q Would you please relate to the jury the circum-

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stances under which y' became aware of such takings?

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1	arjb 4 O'Reilly - direct 265
2	or distribution of records after August 5, 1974? Did you
3	attempt to contact anybody at any time?
4	A After August 5th?
5	Q Make it after August 1st if you will
6	A I believe I spoke to Aaron Levy it is coming
7	back to me as a matter of fact I spoke to Aaron Levy
8	who was the vice president at this time.
9	I spoke to him and Tony was not there and I asked
10	where he was and he didn't know.
11	I asked him what he was doing and he told me,
12	Aaron Levy told me he was trying to find jobs for people
13	in his department. The man told me that.
14	MR. O'REILLY: I have the chart situation now %
15	and this really would be a good place to break.
16	THE COURT: We will take a recess now, ladies
17	and gentlemen.
18	(Jury left the courtroom.)
19	THE COURT: What is the expected proof now of this
20	expert? I take it you have some basis or foundation for
21	this exhibit showing the chart position?
22	MR. O'REILLY: Moreover, Father O'Reilly will
23	bring that in. First we will point out and I am going to
24	finish with Father O'Reilly's exposition of all the songs
25	which reached number 61 in the year 1974, a compilation
	TI .

B2

which he did in order to show what the average song did in the year 1974.

We are combining that with the fact that Fear No Evil had sold 50,000 or approximately 50,000 copies as of the time that Famous was sold out.

Now, when Mr. Purcell comes on he will be asked to give his opinion, based on these factors and his experience, and his very, very comprehensive experience in the industry as to assuming that a song reached a certain level, that would generate sufficient public response and recognition of the song to enable him or some other competent producer to book a concert tour, and, if so, what would be the parameters of such a tour and he would go through that and there will be proof of numbers, amounts of stadia or concert halls involved, percentages —

THE COURT: Wait a minute now. First, he is going I suppose to make an assumption that he would agree to book a concert tour on the basis of a song reaching 61.

MR. O'REILLY: That is correct.

THE COURT: And I gather then he is going to make an assumption it is going to rach some other point. What is the assumption as to what point it will reach?

MR. O'REILLY: Anywhere between 20 and 30 would be sufficient, position 20 and 30 on the Not Soul singles.

THE COURT: You say Father O'Reilly is going to show that every song that reached 61 -- 30 per cent of those reached 30 or better?

MR. O'REILLY: No, he is going to show that songs that reached 61, better than 30 per cent reached 20 or better -- 20 or better. That is taken directly from the charts, that is mathematical.

THE COURT: That is even-Steven.

MR. O'REILLY: It is better than even.

MR AMABILE: It is not really, your Honor.

If I may on that, because records are not like other items for sale. One record may succeed, another may not.

THE COURT: It is a 50-50 proposition.

MR. O'REILLY: It is better than that.

THE COURT: As far as the details, the problem is a threshhold problem, whether even that proof is admissible.

MR. O'REILLY: That proof is nothing but mathematical proof, your Honor. It is mathematical proof.

THE COURT: But you are dealing with matters of attistic preference which cannot really come in in that manner.

MR. O'REILLY: That is in my brief as I have shown you where the other party caused the breach which

renders damages less than certain if you in fact have actual damages, and certainly there is a fact of actual damages, that is beyond doubt, we were forced to take an RCA contract where we weren't even the co-owners any more as opposed to one of the Virgin contracts where we were co-owners of those records.

Now, we had to take the RCA contract and we're only going to get a small royalty percentage. That is obviously an actual damage as to what happened as a result of what ABC and Famous and the rest did.

In addition to that, our records were converted -
THE COURT: I appreciate all that but you are saying that where the song has a one to one chance of getting
to the level where a man might book a concert, that then
an expert witness who is engaged by you at a fee is going
to be permitted to take the stand and say I would have booked
them and they would have made this much money from the
concert in which I would have booked them.

MR. LAWLESS: On that same point he would even project as to the number of people that would have turned out. This is ridiculous.

MR. O'REILLY: This is not ridiculous, that is your characterization.

THE COURT: A 50 per cent chance approximately of

O'Reilly - direct

the songs would have not made it.

arjb 8

MR. O'REILLY: If we then go to 30, the percentage increases dramatically at the top 30.

MR. LAWLESS: There are statistics on name people.

MR. O'REILLY: There were new names that go onto number 1. That is the same as Jesus Christ Superstar or Godspell.

THE COURT: I have the feeling that the show unhappily was not part of this picture at this moment. It is Fear No Evil.

MR. O'REILLY: It most certainly is but once a single starts to make this kind of noise in the industry as they say, then what the record company typically does is it takes the single and puts a stamp on the album indicating that this album that you have this new hot single Fear No Evil and that stimulates the sale of the album which is further recognition.

MR. LAWLESS: It is the domino theory.

MR. O'REILLY: Mr. Purcell will be prepared to talk about what happens if it reaches 30 and his experience in the business and it is a vast experience and the kind of response it will generate that would enable him to book it and we have a right to show that kind of evidence.

As to how you explain it to the jury, that is a

1	arjb 9 O'Reilly - direct 270	
2	second question, that is another question as how you ex-	
3	plain it.	
4	THE COURT: You say to the jury you have got to	
5	take the leap or speculate that this would have been within	n
6	the 50 per cent that would make it as opposed to 50 per	
7	cent that don't make it.	
8	MR. O'REILLY: But the fact is that 50,000 copie	s
9	of this record were sold, 50,000 copies.	
10	THE COURT: 50,000 copies of other records were	
11	sold.	
12	Mr. O'Reilly, what about your language at page	
13	544? .	
14	MR. O'REILLY: Judge Cwen, now, I know that I	
15	couldn't give a number as to how high that would have	
16	gone.	
17	THE COURT: You are just saying your client	
18	couldn't.	
19	MR. O'REILLY: That was a case where you had a	
<b>2</b> 0	breach of contract caused by the other side, they permit	
21	that and it says it right here. The caused the breach.	
22	Once they caused the breach the law is very clear up to	
23	and including the Supreme Court in the Story case that	
24	you then have to talk about reasonable estimates. That	
25	you can use, the best reasonable estimate. You can take	

**B3** 

all the songs in the same position during that year and trace how high they went to see what the percentages would be of a song that this song normally would have been expected to reach.

MR. LAWLESS: This wouldn't even meet the average.

MR. O'REILLY: It is 75 per cent up to the top

MR. AMABILE: There was a State Court case that was not too dissimilar from this. The author wrote a book for a publishing company and the publishing company did not publish the book and the authors sued among other things for lost royalties and the case went to the Court of Appeals and the Court of Appeals said the only measure of damages which this author would have would be the lost royalties but lost royalties are too speculative and therefore he has not proven damages.

MR. O'REILLY: We are dealing with facts in that case that are no where near the facts in this case because no books were ever sold. They never sold any books. We sold 50,000 singles.

We are going to have testimony that says 50,000 singles already sold at 61 is tremendous progress. It shows great potential to go further.

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MR. LAWLESS: The jury not being present, this what our proof will be as to just how great it was in its growth.

THE COURT: This should be marked as a Defendant's Exhibit for identification.

(Defendant's Exhibit A marked for identification.)

THE COURT: Explain this to me.

MR. TRIGGS: We have plotted the songs on the chart that reach 10 or better and their progress was plotted, how long it takes them to get to 10 or better and that is that curve.

We took the course of the Fear No Evil song and attempted to show its progress on the charts to its highest position and you can see, your Honor, where the point we are making is their performance compared with how records perform reaching the top 10 and how long.

MR. O'REILLY: That is irrelevant. The time it takes to get there is irrelevant and besides that is the top 10 and we are talking about the top 20. It is not even the same chart, your Monor.

THE COURT: But the whole thing is speculative and I have to decide whether you are going to be permitted to speculate.

1	arjb 12 O'Reilly - direct 273
2	MR. O'REILLY: Precisely.
3	MR. LAWLESS: I represent to the court that the
4	chart I have just marked Defendant's Exhibit A for iden-
5	tification supports the affirmative case.
6	MR. AMABILE: I will show you the transcript,
7	page 690.
8	(Recess.)
9	(Continued on next page.)
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O'Reilly-direct

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(In open court; jury present.)

THE COURT: Would you mark this as Defendants' Exhibit A for identification.

> (Defendants' Exhibit A was marked for identification.)

THE COURT: If I can invite you gentlemen up here just for a quick moment.

(At the side bar.)

THE COURT: I assume you are about to go into the subject of how the Father, by making an analysis would have said that songs that reach 61, of songs that reached 61, approximately 50 per cent --

MR. O'REILLY: More than 50 per cent.

THE COURT: -- got to 20 or better.

MR. O'REILLY: Or better, yes.

THE COURT: All right.

MR. O'REILLY: That will be through the charts, The char s themselves -of course.

THE COURT: I understand that is your proposed I will give you a chance to argue against it. evidence. My inclination is to exclude that evidence.

> I have to object. MR. O'REILLY:

THE COURT: I know you probably do. Let me give you the reasons that I believe it must be excluded as a

O'Reilly-direct

matter of law.

First we all concede it has an element of speculation in it. It is a question of how much speculation.

MR. O'REILLY: I --

THE COURT: Let me finish my ruling, my thoughts on this, which would be the basis of the ruling that I feel that I will reach.

We all concede that there is an element of speculation even in the proof that is to be offered because a 50-50 chance roughly necessarily is going to require the jury to speculate.

MR. O'REILLY: I have to --

Your proposed evidence has no offer whatsoever of a showing of when the 61 was reached by any given song in relationship to when it started. In other words, you are just going to say a song that reached 61, and it might have reached 61 in the second week and made the 20, and for this purpose I am going to treat it as being so, although we may have to deal with it later.

I am shown Defendants' Exhibit A for identification. That chart I am told contains a listing of all songs that made 10 and the speed with which they ascended

O'Reilly-direct

to that position. It is averaged out in that regard.

MR. LAWLESS: Yes, your Honor.

which I do for this purpose, indicates to me that if you have a hit on your hands, you know it quite early. In fact, you know it long, long before this song even reached 61. If I can sort of characterize it, the average of these songs getting to 10 have reached 10 even before your client's song reached 76. Your client's song is still meandering at 76 when the average of the successful ones has reached 10.

It is four weeks later, it is still only at 61.

I conclude from that that if you are going to know about

a hit, you are going to know about it early. Given the

fact that Father O'Reilly is not prepared to say when the

61 songs make 20, I can only conclude that there is probably

a pinch in there of the fact that these songs were 61 and

in the second or the third week on their way up to 40 or

up to the 10.

Also I must say that I feel that you have gone on record here personally at page, whatever it is, 300 --

MR. TRIGGS: 1143.

MR. AMABILE: 544.

THE COURT: 544 and 1143 of the record, when

O'Reilly-direct

your client was asked, "Do you have in mind how far this song would have gone?" And your interjection was, "That is pure speculation as to how far it would have gone obviously. It could have gone to number one. It could have gone to number 30, it could have gone to number 50 or whatever. He has no way of knowing that. That is pure speculation."

That in my judgment reflects your state of mind as counsel on this whole subject matter which I give some weight to in the assessment I make.

Washington Equare Press. which is in the New York Court of Appeals. Therefore, it is binding upon us in this divertisy case. It is cited at 357 New York Supp.2d 857. While it isn't exactly analogous, the Court in that case awarded damages based upon expert testimony as to hard cover sales. It denied damages as to paperback sales on the theory that the plaintiff's proof was conjectural.

Now, it seems to me that stepping off from your 61 position, that on a 50 per cent chance it would reach 20, I don't credit in a 50 per cent chance because I have no demonstration here of when these songs that were at 61 reach 20.

So I think the figure is even lower if you were to get right down to it.

I feel that that is much too conjectural to permit this jury to speculate on it. Therefore, absent some very strong reason to the contrary, I propose to exclude it.

O'Reilly-direct

MR. O'REILLY: Let me begin by saying that the speed at which a song mounts the chart has no correlation at all as to whether or not that song is going to be a hit.

I can give you a specific example of a song in the past. The lead song from Godspell took a full year before it got to Number 5, but it slowly but steadily mounted those charts and kept right on going until it reached up into the top 10. That song from Godspell is the same concert album that we are talking about here. We are talking about Jesus Christ Superstar, we are talking about Godspell and we are talking about Virgin as being the sme kind of rock opera and concernt album.

Honor, that Fruend case is not on point with our case because in our case we are talking about the same records, we are talking about the record which had already sold 50,000 records. We are going to demonstrate that that is an excellent sale of records for a song that has reached that position on the chart and, therefore, show great promise that many, many more records were going to be sold and,

O'Reilly-direct

THE COURT: I don't think there would be any question of the admissibility of an expert saying that a song that sold 50,000 records might continue to sell records for a certain period of time and might continue to sell a certain number of records and the royalties on those would be dollars X, to then boost that into a top seller upon which somebody else is then going to say he would have booked a concert tour in my judgment goes way beyond the realm of anything that I am prepared to permit this jury to speculate on.

MR. O'REILLY: I have to be allowed to finish what I am saying. It is very important to us, your Honor, that this be understood from our standpoint.

First of all, as far as any testimony is concerned, and it is not testimony obviously, it is just a statement of counsel during the deposition, what I had in mind was we were going to use statistical proof to show what that level was, that it was going to reach, not me sitting there and speculating or Father O'Reilly at that time. We would buttress that information once that was in by an expert to be brought in.

Father O'Reilly was not testifying as an expert there, nor was I. What they wanted to do at that point

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O'Reilly-direct

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was to try to have us say it would have gone to a certain level with no proof. They will ask what is your proof of that. There wouldn't have been proof at that time because thereafter we worked out the charts. It ook us -- do you know how many charts we went through? We have a stack of charts.

understand that. I think that assuming that Godspell did what you say it did, and I treat that as a fact for this case, the fact that one record under certain artistic circumstances meanders to the top does not make -- one swallow does not make a summer for this jury to bask in on the question of your client's damages.

I just don't see it.

MR. O'REILLY: The question of whether damages are speculative or not is a conclusion. That can only be reached after the evidence is in.

THE COURT: The question of damages is

based upon a representation to me and I am charged with

making a determination whether as a matter of law the jury

may speculate in this area, and you have given me nothing

that --

MR. O'REILLY: You see, the jury doesn't speculate. The jury makes reasonable estimates based on

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the evidence that it is given.

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You have a situation where the progress up

the chart of a record is just killed by these people when they sold the company out. They are the people who prevented that record from going higher. Therefore, they should not be allowed -- and the cases support this -- they should not be allowed to block evidence of that by saying it is merely speculative. You have to take a reasonable estimate. You have to do a reasonable estimate, pur Honor, of what can be done in this regard.

THE COURT: Mr. O'Reilly, I appreciate the earnestness that you feel here. I am afraid I am going to rule against you, which I do.

MR. O'REILLY: Your Honor, I object to this right now. This is a matter we are going to --

THE COURT: You may have your exception.

MR. O'REILLY: Are you going to allow me to introduce the charges themselves?

THE COURT: I rule on what is before me.

(In open court.)

BY MR. O'REILLY:

Father O'Reilly, when we broke I think we were discussing ABC and gur trip out to ABC.

We were further discussing the receipt of letter

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THE COURT: Sustained as to form.

Q Father O'Reilly, on or about July 31, 1974, did you have a conversation with anybody at Famous Music with respect to the Crunch agreement and the sale of Famous Music?

A Yes.

Q Will you please tell the jury the substance of your conversation, what you said and what the other member, the other person said and identify him, please?

MR. AMABILE: To the extent it may call for self-serving declarations by this witness I object to the question.

THE COURT: Overruled.

Who was there?

THE WITNESS: Tony Martell, your Honor.

THE COURT: What did you say to each other?

THE WITNESS: I was talking to Tony about the sale and I mentioned to him, "What happens to us, what happens to our product?"

And he told me that they were being shipped, every thing was being shipped to ABC and I would have to go to ABC to find out what was happening to our product.

Q Father O'Reilly, I think you previously testified that you did in fact go out to ABC.

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1	æjb	O'Reilly - direct 349
2	A	Yes.
3	Q	While you were there, did you bring up the Crunch
4	contract	with anybody from ABC?
5	Λ	Yes.
6	Ú	With whom did you bring it up?
7	λ	With the attorney representing ABC.
8	Q	That is?
9	λ	Len Korobkin.
10	Q	What was the substance of the conversation?
ıı		MR. AMABILE: Objection to that.
12		MR. O'REILLY: This is introduced in mitigation
13	of damage	s.
14		THE COURT: Overruled, you may answer. Go ahead.
15	Q	Go ahead, Father.
16	A	I mentioned to Len Korobkin that I understood
17	that all	my product was being taken by ABC and I asked
18	him what	this was all about.
19		His response to me was
20		MR. AMABILE: May I understand if this is a
21	separate	conversation from the one testified to yesterday
22	or a repe	at of the conversation?
23		THE COURT: I don't know. I will permit this in
24	evidence	because Martell told him to talk to these people.

and find out what was happening with his contract.

1	arjb O'Reilly - direct 350
2	- MR. AMABILE: Martell never made ABC his agent.
3	THE COURT: I know but objection overry
4	Q Go ahead.
5	A I spoke to him while I was there at lunch and
6	also in his office after lunch.
7	He mentioned to me that he used the wore,
8	"Please, listen, we just are trying to work our way through
9	this whole mess as quickly as possible. We are just taking
10	all Famous Music's stuff off the market and then we will
11	decide what we want to do with some of it and the rest of
12	it, that is business. Business is pusiness," is what he
13	told me.
14	He said, he told me
15	MR. LAWLESS: Is this what was testified to yes-
16	terday?
17	THE COURT: This is the same conversation.
18	THE WITNESS: He said it a few times.
19	THE COURT: In the same conversation?
20	THE WITNESS: No, no. Let's be very clear, he
21	said this a few times. I can tell about the phone calls
22	where he said it again three weeks later.
23	MR. LAWLESS: Could the witness just wait the
21	court's decision?
25	THE COURT: Is this the same conversation you

1	arjb O'Reilly - direct 351
2	testified to yesterday?
3	THE WITNESS: No, there were two conversations
4	I mentioned the one at the meal and then one in the office
5	and we talked twice.
6	THE COURT: The same day?
7	THE WITNESS: Yes, the same day.
8	THE COURT: Just so we understand.
9	Q Limit this to the Crunch portion of the conver-
10	sation rather than to the Virgin portion.
11	A His words with regard to Crunch, "I don't want
12	to hear about Crunch. I don't even want to hear about
13	Crunch." That is what I got.
14	Q Did you mention to him at all the existence of
15	the Crunch agreement?
16	A Sure.
17	Q What did he say, if anything, about that?
18	A He said, "We are not interested in any distribu-
19	tion agreements. Maybe Famous needed them, we don't need
20	them."
21	Q All right, Father. After you returned from the
22	west coast did you have occasion to contact distributors
23	with respect to the disposition of your Crunch inventory,
24	Crunch recordings?

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Yes.

inventory."

1	arjb	O'Reilly - direct	353
2	Thi	s one is from Nashville, Tennessee	, "Gentlemen,
3	please be adv	vised that our Crunch inventory was	returned
4	to ABC Record	s with other Famous products on Au	gust 12,
5	1974."		•
6	MR.	O'REILLY: Will you mark this, pl	ease.
7	(P)	laintiff's Exhibit 33 marked for id	entifica-
8	tion.)		
9	MR	. LAWLESS: No objection by Famous.	•
10	MR	. AMABILE: I object to the offer,	your Honor.
11	TH	E COURT: Let me see what it is.	
12	MR	. AMABILE: On the ground that it i	s hearsay.
13	(11	anded to court.)	
14	וויר	E COURT: Received against Famous of	only.
15	(P	laintiff's Exhibit 33 for identific	ation re-
16	ceived in ev	ridence.)	
17	Q Fa	ther, I hand you a one-page document	nt
18	TI	HE COURT: You can read it to the j	ury.
19	М	R. O'REILLY: First I want him to i	dentify that
20	he received	it.	
21	TI	HE COURT: It is admitted in eviden	ce, is it
22	not?		
23	Ω Β	id you get that?	
21	A Y	es.	
25	М	R. O'REILLY: Fine. This is a tele	egram to

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O'Reilly-direct

to bring in each priest to testify as to each of them.

THE COURT: I see. All right. In any event,

34 for identification is I rule not admissible under the shopbook rule.

MR. O'REILLY: If that is the case, I would like to be able to go to Father O'Reilly testifying on the charts as to --

MR. LAWLESS: Could I hear this, Mr. O'Reilly?

I cannot hear Mr. O'Reilly, your Honor.

THE COURT: Come up to the side bar, gentlemen.

(At the side bar.)

THE COURT: Counsel O'Reilly last night asked me if I would reconsider my ruling as to the future of FEar No Evil on the charts if he were to have the witness testify that statistically there was a 65 per cent chance of a work that had reached 61 on the chart reading 30.

MR. O'REILLY: Or better.

THE COURT: 30 or better.

Again, I am troubled by the fact that we have no time frame and from that Exhibit A, which is apparently conceded to be accurate for this purpose --

MR. C'REILLY: No, it is not, your Honor. We

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O'Reilly-direct

haven't laid a proper foundation for it.

THE COURT: Let's put it around the other way.

Father O'Reilly is not prepared to testify as to any time frame in which these ones that have reached 61 then go on to be 30.

MR. O'REILLY: Yes, he is. He is shaking his head yes.

THE COURT: That was not in the offer that you made to me, in any event.

I have a feeling that whether a song is at 61 in the third week or in the tenth week makes a lot of difference.

I am also frankly troubled by the fact that this still requires the jury to speculate not on a 50-50 basis, but on a 2:1 basis as to whether it would make it.

Further, I am also troubled by the fact that what it really amounts to is: Judge, if you don't accept a 50-50 basis to get to 20, would you accept a 2:1 basis to get to 30. If it gets to 30, I have an expert witness that I could put on the stand to say this and that would happen.

I find that a very troublesome way to present a matter to a Judge.

MR. LAWLESS: I was not aware of the 65 per cent offer, your Honor.

In reviewing the records last night we find, your Honor, that actually they are at 47 per cent.

MR. O'REILLY: No, not true.

MR. LAWLESS: Read the pretrial order.

MR. O'REILLY: That is not true.

THE COURT: Where is the pretrial order?

MR. O'REILLY: That is simply not so. They have documents that I have given to them long ago, your Honor, which show the 65 per cent --

MR. LAWLESS: Excuse me. It is an earlier memo that we are handing up to you now, that the plaintiff submitted to us. They made the claim of 47 per cent.

Also, your Honor, we have another exhibit, if you want it at this time. I don't want to offer it out of order otherwise. That will show that the real basis for growth is the number of bullets, meaning the speed with which -- you just said it before -- a particular song goes up the ladder.

THE COURT: Yes.

MR. LAWLESS: That shows that because of the slow speed of FEar No Evil, that there was really no chance for it getting to a position that is claimed. It never had

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one start at any time.

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MR. O'REILLY: What is a start, Mr. Lawless?

Do you mean a bullet, by any chance?

MR. LAWLESS: A bullet and a start I use interchangeably.

MR. O'REILLY: Nobody else does.

MR. LAWLESS: I do. I am new at the trade.

MR. O'REILLY: We recognize that.

MR. LAWLESS: Thank you very much. I recognize your courtroom newness.

THE COURT: Gentlemen, please.

MR. O'REILLY: We have given to the other side in our answers to interrogatories, and they have been aware of them now for several months, the complete list of 324 songs during the year 1974, which reached position 61 and their progress up the chart from there. They know what the statistics are and they are purposely putting in the wrong set of statistics, your Honor.

MR. LAWLESS: That is ridiculous.

MR. O'REILLY: We will see.

In any event, your Honor, the more recent set of statistics, and which was explained in detail in our answers to their interrogatories, shows that the figures we talked about were accurate and, moreover, Mr. Purcell

gab-10 O'Reilly-direct 367
indicated in his signed statement that he will be prepared
to testify if this song reached 30 or better that it would
do the things that he said.
THE COURT: Mr. Murcell is a musical
book agent
MR. O'REILLY: He is
THE COURT: who has been doing that all his
life.
MR. O'REILLY: He is a lot more than that.
MR. LAWLESS: And a fireman.
THE COURT: No. The thing is
MR. O'REILLY: Please
THE COURT: I assume that he is coming here
and is going to testify and is going to be paid a fee for
his time and expenses in this thing. You are going to
put him on the stand to give to the jury figures of what
would have happened if something else had happened.
The fact remains that it is speculative to
determine if something else would have happened.
MR. O'REILLY: What is speculative? That is a
conclusion.
THE COURT: It is speculative. It is a 2:1
speculation.
MR. LAWLESS: It is a two-step speculation.

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## O'Reilly-direct

MR. O'REILLY: It is in favor of what we are trying to say.

THE COURT: How do you know that this song would You have a 2:1 chance it would have, have reached? you have one chance that it wouldn't have.

MR. O'REILLY: When they breach, as they did, and there is actual damage, the case law up into a Supreme Court case holds that you are entitled to put in any reasonable method of computing damages.

THE COURT: I know. I am not convinced that that is a reasonab . method.

MR. O'REILLY: Under the circumstances it is the most reasonable if you think about it, your Honor.

What other method could be done? is the lost reasonable way to do it. We have thought long and hard about this.

THE COURT: If I had seen that your song was 61 in the third week, you might then have a different pic-There is going to be no showing that a song that was 61 in the tenth week --

MR. O'REILLY: Do you remember --THE COURT: -- has any substantial chance at all.

Is the Father going to say that a song 61 in

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the tenth week stands at 2:1 --

MR. O'REILLY: Looi, your Honor. In this case, your Honor, these priests were out promoting this song --

THE COURT: I don't care about the promoting.

You are telling me what this man is going to say as the basis for getting other evidence in.

MR. O'REILLY: Yes, your Honor. I want to say one thing. We tried to show that this record -- the rate of movement up the chart of this record was accelerating when it got cut off by then. You said that wasn't important. Now you are telling me that the rate of movement up the chart is important. We are getting it from both ends, your Honor.

We were prepared to show that this record was moving up the chart at increasing rate when that song was cut off.

By God, it was.

THE COURT: The fact remains that what he is going to say is as a statistical matter, a song that was at 61 has a 2:1 chance of making it to the top.

MR. O'REILLY: To 30 or better.

THE COURT: to 30 or better.

MR. O'RETLLY: Right.

THE COURT: He is not prepared to say whether

to excuse you again.

(Jury absent.)

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## O'Reilly-direct

THE COURT: Mr. O'Reilly, would you please put Father O'Reilly on the stand and ask him the questions that you would ask him that would lay the foundation for this statistical demonstration that you intend to adduce.

Mr. Lawless, Mr.Amabile, you will have an opportunity to cross-examine before I have concluded on this phase of the hearing.

## BY MR. O'REILLY:

Q Father O'Reilly, I now hand you a multi-page document which is entited Songs which attain position at least
No. 61 on the Billboard Hot Soul Singles chart during

I ask you, Father O'Reilly: Do you recognize that chart?

- A Yes, I do recognize it. I prepared it.
- Q All right.

Father, would you explain, please, to the Court the manner in which you prepared such a document?

MR. LAWLESS: Do we have a copy of this?

MR. O'REILLY: Of course you do. You have had

it for six months.

MR. LAWLESS: I just asked a question.

MR. O'REILLY: Ask Mr. Triggs. He can tell you.

He has had it for months.

'O'Reilly-direct

THE COURT: Go ahead.

A I want my copy of this that I made notes on from last night. We didn't get a copy of what they introduced yesterday. We didn't get it last night from them.

MR. LAWLESS: We weren't expecting to put our proin out of order, if that is a question, your Honor.

MR. O'REILLY: That proof --

THE COURT: Please.

Q Is this the document you are talking about, Father?

A Yes.

Q Father, you were beginning to explain.
Would you please continue.

A Yes. What I did was I took every song in the year, every song in the year that ever made it to 61, every song -- I want to make it very clear -- that made it to 61, and I traced the upward movement of that song, I traced the final number that it landed at, I traced who the artist was and I traced what the name of the song was, I traced the week it was when I did it.

I took them all and I broke them down as to how many of these songs reached top 10, how many of them reached top 20, how many of them reached top 30, and

1	54a
1	gab-16 O'Reilly-direct 373
2	T tried to keep the fairest evaluation possible on these
3	songs; every song of the year, not one-third of the songs,
4	but every song of the year.
5	Q What do you mean by not one-third of the songs,
6	Father?
7	A If you take
8	THE COURT: Wait. Let's not get into that.
9	You say you took every song that reached 61
10	and you traced what happened to it.
11	THE WITNESS: I traced exactly what happened
12	to it. I followed it up. I have backup proof
13	THE COURT: What happened as an average to those
14	songs?
15	THE WITNESS: The average song reached the
16	top the average song, the 50-50 actually a little
17	average reached top 20 irregardless of company that
18	was promoting it, whether it was a monster promoting it
1	THE COURT: I know. All right.
2	THE WITNESS: or the littlest company in the
2	world promoting it or four priests promoting it. I took
	every song.
**	THE COURT: Have reached 20?
	THE WITNESS: Yes.
	THE COURT: What reached 30?

THE WITNESS: 30 -- let's see here. 65 per cent reached 30, 76 per cent reached 40. This is of 324 songs.

THE COURT: Did you make any analysis of the time frame in which those heights were achieved?

THE WITNESS: Yes, absolutely.

THE COURT: What was the analysis that you made?

THE WITNESS: My analysis was the time frame

coincided directly with two major factors.

One, was this group already known. Was it a Supremes, a James Brown, a Four Tops.

Number 2, who was the company promoting this group. Was it a company promoting it nationally in 50 markets at the same time with independent men working it.

THE COURT: No.

THE WITNESS: This is my analysis.

THE COURT: What I am getting at is this,

Father: The 61 that was the starting point for you, where

was that reached by these various songs, the half that

reached 20? Was it reached in three weeks, four weeks,

two weeks, five weeks? What I am trying to get at, quite

frankly, is this: I get the feeling from what I understand

here that if a song is going to reach the relative top

it starts to show the promise very early, and bythat I mean

2 within three or four weeks.

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That is not true. That is one of the basic mistakes that have been made here.

THE COURT: Did you make any analysis whatever of where these songs were at 61 when you first plotted them at that point?

THE WITNESS: Say that again.

THE COURT: Where were these songs at 61 when you first plotted them? Was the average of them three or four or five weeks deep, ten weeks, 15 weeks?

> MR. O'REILLY: Your Honor, if I may --THE COURT: No.

THE WITNESS: In other words, before I put all my direct in, I have to be cross-examined on it? don't understand this yet. Ihaven't given my full analysis yet.

THE COURT: Look, I am going to find some contempt around here unless I get answers. I am doing my best to try to find this exhibit of yours admissible on some theory. If you want to give me an argument, I will rule it inadmissible. I am trying to find out whether or not there is some basis for letting it in because the Federal rules like to have evidence be admissible.

If you are going to give me an argument when I

am trying to get real facts from you from which I could reach such aconclusion, Iwill terminate this inquiry.

Do you understand that?

THE WITNESS: I understand that.

THE COURT: I am in recess.

(Recess.)

(In the rabing room.)

end of my patience. I am presence with a case where you may have a case. I am trying to see to it that that case, if you have a case, is fairly presented to the jury.

I am being presented here in situations one after another where evidence is not in existence, where things are urged upon me that are alleged to be shopbook entries, and they are not. I am doing my best to see to it that any evidence that you give me gets to the jury if it is admissible.

MR. O'REILLY: I understand that, your Honor.

take the kind of implied comment that I am crossexamining your witness and unfairly dealing with him when
I am trying to see whether or not there is anybasis whatsoever that this chart is admissible. Because unless
he sees me as to the underlying merits of this chart and

if I may.

that it affords the jury some basis for a reasonable determination, I cannot let it in.

MR. O'REILLY: I understand.

THE COURT: In the course of thatinquiry of him, and I don't remember what the last answer was, but I found it offensive.

because I am dealing here all the time with evidence that is thin or doesn't make it. I am finding that I am receiving criticism when I am required to rule as I must.

As a District Judge, I am required to rule that something is not admissible on this ground or that ground. I wish you would go back to your client and please just give him my observations. I will resume here in three or four minutes.

MR. O'REILLY: I will do that, your Honor. First I would like to be heard, your Honor,

THE COURT: You may.

MR. O'REILLY: All right.

I think the point that Father O'Reilly was trying to make, which was the same point that I tried to make earlier, was that the evidence that we are introducing provides a reasonable basis --

1	gab-20 O'Reilly-direct 378
2	THE COURT: I understand all that. You
3	argued that to me. I have had it in your brief.
4	MR. O'REILLY: Let me go through this for a
5	moment.
6	THE COURT: I don't need that. We argued
7	this yesterday. All I want you to do is talk to yourclient
8	so that
9	MR. O'REILLY: I understand that.
10	May I make this point, please.
11	THE COURT: You have.
12	MR. O'REILLY: No, your Honor.
13	THE COURT: You have. You told me, you
14	have told me. In a memo you said where the evidence is
15	difficult to come by and a party has deliberately breached
16	an agreement, the Court must lean over backwards to allow
17	a party to prove his damages. That is what I am doing.
18	MR. O'REILLY: I understand that. I will
19	go past my part to the other part.
20	The point is, ifthis evidence is before the
21	jury, the other side when it comes time for cross-examination
22	can put on either they cancross-examine Father O'Reilly
23	as to what you were doing, did you make this observation,
24	or they can bring on their own expert to point out that
25	this observation is misleading or inaccurate or not the

1	gbb-21 O'Reilly-direct 3	79
2	best.	
3	THE COURT: You misunderstand my function	n
4	here at this point.	
5	If I conclude that I would not permit a	i
6	reasonable jury to make afinding based upon conjectur	e
7	and speculation, then I am not going to let the evide	nce
8	in at all.	
9	MR. O'REILLY: I understand what you are	saying
0	THE COURT: I am not to give the jury the	alter
1	tive between two speculations. Unless your evidence	
12	rises above the level of speculation, it is not admis	ssible.
13	MR. O'REILLY: Because you can always,	
14	after you have heard the evidence, tell the jury tha	t they
15	are to disregar d	
16	THE COURT: That is what I am trying to d	0
17	right now before I give it to them at all.	,
18	MR. O'REILLY: After you have heard both	
19	sides, your Honor	
20	THE COURT: No, no. I would not do i	t that
21	way, in any event. There has to be a threshold sho	wing
22	to me that it is going to be admissible. I determ	ined
23	yesterday clearly that on the figures there was no s	uch
24	showing. I am 'rying to see now whether a showing	can
25	be demonstrated. Maybe it can, maybe it cannot.	

MR. O'REILLY: All right. Please bear in mind one thing now. You are making the assumption that the length of time that a song --

THE COURT: Don't argue the thing with me.

I want to get the facts from your client.

(In open court; jury absent.)

THE COURT: Father O'Reilly, did you make any effort to chart or write down where these songs reached 61 in terms of time?

THE WITNESS: Did I write down or make a chart on whether these songs --

THE COURT: Can you in some way tell us where these --

THE WITNESS: Your Honor, what I did -- could I explain to you what I did? I got copies of every Billboard and took the pages out. I took a song that was No. 61 onJune 5. I then looked on June 12th to see what number it had gone to. I then looked -- I followed every song up the chart.

I found -- my findings were if there was a well-known artist, the record moved much faster up the charts. If there was a large record company promoting it, the record moved much faster up the charts. I found that sometimes the higgest record -- I believe the biggest

'O'Reilly-direct gab-23 record either that year or the year after was a record by Sylvia on all platinum records that sold over two million copies. This record took a long time to make it up the charts. It was obvious because it was a small company promoting it. That is the basis of what I found. (continued on next page.) End 5 

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BY THE COURT:

Q Then I take it you obviously get into questions of the quality of the music or how it is received by the public? That is another factor.

A The charts work by how many stations go on the chart on a given week. That is how they work their way up the charts and there is a cutoff point on the charts.

First it works on how many stations say out of a large number, 70 stations, how many go on at once and as it starts its way up the charts, and the charts admit this, it is written on the charts to the top 10, the large volume of sales move it. But initially if the record is put on 40 stations at the same time, it comes on the chart with a bullet like Elton John or wherever the record is promoted by a smaller company on four or five different stations who received it at the same time, it will come on slowly.

Q Do you know how long any of these songs that reached 61 had been on the charts before they reached 61?

A Do I know how long they had been on the charts?

An average?

Q You said you found that the song which hit the chart, hit 61 on the second week and you followed it there after?

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A Yes.

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Q Do you know how long any such song had been on the chart before it reached 61?

- A Any song, any particular song?
- Q Any of them.

A The record by Sylvia which I believe was the biggest selling record of that year was on the charts, my recollection -- I could get them out and look for it for you if you like --

Q How about any of the others, do you know about any of the others?

- A The four --
- Q What I'm trying to find out is whether --
- A What the effect of how long it takes to reach 61 is on the record?
  - Q Right.

A My answer is that the effect is directly concommitant with the size of the company promoting how many stations pick it up at once, that is to get to 61. If it gets to 61 there is a large amount of air play. That is what we are talking about, the air play because sometimes it takes a month for a record to even be fully in every single store after it is released. It takes that long to get it into every store.

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So the initial jump on the charts is always on radio stacion play and that is why you find that Elton

John can come to the charts real strong and start number

in one week, because they got all the exposure because of their reputation.

That is how it works, it is not a question --

Q The answer to my question is you don't know what the average length of time is that these songs were on before they reached 61?

A If I made an approximation I would say it is the same as the amount of progress afterwards. It is in direct ratio to the progress afterwards.

If a song jumped from number 1 after it reached 61, the ratio would be exactly the same before it did.

If the song took longer to reach 61, it would take longer to go higher unless it is run by a small company and the momentum starts to pick up.

THE COURT: Do any of you gentlemen want to ask questions now?

MR.LAWLESS: I have one or two.

THE COURT: Does plaintiff have any further questions at this point?

BY MR. O'REILLY:

Where did we finish now? You had gone through I

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### O'Reilly

2 believe --

A All of it. I want to mention that -- I am sorry
I didn't mention that the top 10 songs is based on approximately -- excuse me -- the top 10 songs that I see here is based on approximately one-third of the overall statistical figure that I gave and that graph which I haven't seen -I saw it yesterday and saw it this morning -- I haven't seen any chart to see how it is figured.

THE COURT: Your counsel has urged upon me 65 per cent reaching 30 without any other factors being involved is the crucial issue here.

Do you have anything further to develop along this line?

MR. O'REILLY: As I said, may I also point out the fact that 50,000 records were sold and that is a very important factor also.

THE COURT: I don't know that that necessarily is before me because sometimes a record that gets to the top 10 may sell a million records. How do I know that the 50,000 mark makes a particle of difference?

MR. O'REILLY: Because Mr. Purcell and Mr. Levy will testify that it does, when they come on as expert witnesses and based on their 20 years each experience in the industry.

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ТИЕ	COURT: To what extent? What does it	mean?
MR.	O'REILLY: That is it is an extremely	prom-
ising record,	that if it starts and the record comp	צמר
knows there ar	e already some 50,000 singles sold, t	hen at
that point		:
THE	COURT: Over 10 weeks?	
MR.	O'REILLY: They are going to go full	out to
continue to rac	ck this record, to put it	
THE !	WITNESS: Jesus Christ Superstar took	one
year.		
THE (	COURT: That is not a top single. We	are
talking about a	a single that gets to the top, they s	ell

750,000 and a million and a million and a half.

MR. O'REILLY: But most when they are in the top 20 and the top 30.

THE WITNESS: It is first the air play.

THE COURT: Mr. Lawless, do you have any cross examination?

MR. LAWLESS: Yes, a question or two.

# BY MR. LAWLESS:

Mr. O'Reilly, in your testimony you mentioned the word bullet. What do you mean by bullet?

I'm trying to remember if I used the word bullet

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in my testimony. 2

MR. O'REILLY: I think I mentioned it.

THE COURT: Did you use bullet?

THE WITNESS: Your Honor, I am pretty sure I did not say that.

The record will show you mentioned the word bullet. What do you mean by the word bullet?

By the word bullet, the bullet corresponds to the different charts, the bullet refers --

The Billboard Hot Soul singles chart --Q MR. O'REILLY: Judge, would he be permitted to finish his answer?

THE WITNESS: Can I finish my statement?

Sure. Q

The charts, as to different charts, if you check it you will find out what I'm saying it true --

THE COURT: Just answer the question.

THE WITNESS: Your Honor, I just felt that I was interrupted there.

THE COURT: What is a bullet?

A bullet is a notation on the chart that shows a record has made a jump of a certain amount of spaces in a given week. That is what a bullet is.

Is this to suggest an above average jump in that

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week or below average or average?

The bullet suggests exactly what it states on the bottom of the chart, what I just said -- I can't say exactly but basically what is stated on the bottom of the chart.

You made your evaluation and did you take into account whether or not songs on the Billboard Hot Soul singles charts which received bullets rose any swifter than other songs on the charts?

That would be redundant since I just explained to you --

Could you answer my question without criticizing it, without saying that the question is redundant? Could you just answer it?

Well, sure. I thought you understood my last answer to you.

Well, I hope I do. Go ahead, please. Q THE WITNESS: May I have that statement once more?

(Question read.)

- Yes, I did take that into the evaluation. A
- You are claiming, are you not, that Fear No Evil, based on its status and rise on the Billboard Not Soul singles charts, would have risen to a position of 20, is

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that correct, because of an earlier rise?

- That is not correct. A
- You correct it for me. Tell us what you claim. Q MR. O'REILLY: He already testified to this.
- I already testified. I will testify to it again. Α

I claim that my chart that I made up takes in every song of the year, not just one-third of them, every song of the year, the whole sampling of songs that reached that and statistically it shows that any given song has an over 50 per cent chance of reaching the top 20 or better and 65 per cent chance of reaching the top 30 or better. That is what I did.

I must come back to you and say as the Judge said earlier to you, does the speed with which it is rising on the charts in that evaluation have anything to do with its ultimate success?

The speed with which it is rising on the charts in my evaluation?

- Yes. 0
- I don't understand your question. A
- Did you take into account from week to week as a song rose how many numbers it was rising?
  - Earlier I said that each week I went through it. Λ
  - Did you find that songs with no stars did as well Q

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as songs with stars or bullets?

MR. O'REILLY: Objection.

THE COURT: Overruled.

A I found that songs could go up to the charts to a certain point without stars, especially songs from small companies and then boom, hit it as the biggest selling record of the year. Sylvia did it because it is in direct proportion to the promotion of the record company and the working and distribution and marketing in the country that determines the upward rise, especially in getting to 61. That is the main contribution, the factor, that is what I found out.

- Q Mr. O'Reilly, with respect to Fear No Evil, did it ever have a star or bullet on the Billboard Hot Soul singles charts?
  - A Did Fear No Evil ever have a star or bullet?
  - Q Yes.
  - A Before it was cut off?
  - Q At any time during 1974.
  - A All right. In its abbreviated life it did not.
  - Q The answer is no, is that correct?
  - A Yes.

MR. LAWLESS: I would like to have this marked as Defendant Famous Exhibit B.

MR. O'REILLY: May I see it?

MR. LAWLESS: After it is marked you may.

(Defendant Famous Exhibit B marked for identification.)

MR. LAWLESS: 1974 Billboard Hot Soul singles charts summary translated to number of stars or bullets received.

MR. O'REILLY: How many songs were involved? THE COURT: Why don't you go on with your examination?

MR. LAWLESS: If I may. I will simply offer this up.

THE COURT: Let me not consider it now until you go through it with this witness as you want.

Mr. O'Reilly, if I understand you correctly, you received no stars or bullets on Fear No Evil during the calendar year 1974?

I believe I said that.

Now, according to Defendant's Exhibit B which I represent to the court is a summary of the Billboard Hot Soul singles chart, 1974 analysis of number of bullets or stars, I represent and ask if that accords with your understanding or finding that for the average piece that year on that chart reaching position of 10, along the way it had

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an average of six bullets or stars?

A I don't understand your question at all. I don't understand what these figures mean.

THE COURT: Please, the question I think is rather simple if you think about it. Mr. Lawless is saying did you in looking at the charts and vorking with them yourself come to a general awareness that songs that had reached lo had received an average of six bullets along the way.

MR. LAWLESS: That is what I am saying.

THE COURT: Did you come to such an awareness in looking at other charts?

THE WITNESS: No, I did not come to that.

Q That is my exhibit, may I have it? I will show it to you as needed.

THE COURT: Any other questions?

THE WITNESS: Do I have a right to look at something and study what it is?

Q I'm not calling you as my witness, sir.

You believe that Fear No Evil should have risen to the position of 20 or 25 or 30 or what are you claiming?

A No, that is not what we are talking about. We are talking about charts statistically showing and that is what is shown.

Q Do you realize, Mr. O'Reilly, that for your piece

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arjb 12 during calendar year 1974 statistically to have reached the position of 30, it would require four bullets or stars measured against the average?

- That is not true. A
- That is not true?
- No.

MR. LAWLESS: That is what the defendant's statistics are as stated and it will be offered at a later point in the trial.

THE WITNESS: That is not true.

THE COURT: Billboard mag zine is the basis for the chart?

MR. LAWLESS: Yes, the same Billboard magazines which are the basis for Defendant's Exhibit A, your Honor.

THE COURT: There are a number?

MR. O'REILLY: We have them right here and we can refer to them if we have to.

Are you aware, Mr. O'Reilly, that with regard to the average piece on the Billboard Not singles charts, 1974 that averaged position 55, they were all recordings which never had a bullet?

I don't understand that question. λ

> MR. LAWLESS: Read back the last question, please. (Question read.)

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Q On the average recording without a bullet, never reached an average higher than position 55, were you aware?

A That had reached 61 without a bullet, at that point they have --

THE COURT: No, listen to it, please. Counsel is asking are you aware -- you may not be and you may be -- but are you aware he represents that from the Billboard charts he has statistically determined that if a song averaged 55 on the charts, this is for the entire life it never received a bullet. Does that generally accord with the nature of things that you got from looking through the charts?

MR. LAWLESS: That is fairly stated.

A I'm not specifically aware of that particular -THE COURT: General situation.

THE WITNESS: I was never shown it nor do I understand the relevancy of it.

MR. LAWLESS: We will leave that to the court.

THE COURT: Anything further?

MR. LAWLESS: Mr. Amabile may have some questions.

MR. AMABILE: I have a few and I will be relatively short.

#### BY MR. AMABILE:

Q Mr. O'Reilly, may I see the chart on which you

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- A You had one for four months, sir.
- Q Does that chart at all indicate whether the compositions on it were performed by first time artists?

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- A No.
- Q There is no reflection at all about whether the record was released by a first time artist in 1974, does
  - A No, sir, this is --
  - Q Just answer my question.
  - A No, of course not.
- Q Does it have any indication of whether any of these compositions were performed by artists who in the past had gold records?
  - A One more time for that question?
- Q Does your chart indicate which of these compositions were performed by artists who in the past had gold records?
  - A No, it doesn't. No chart does.
  - Q Your chart does not?
  - A Neither does Billboard.

THE COURT: But one could go and one could determine if that artist had a gold record. The question is whether, the underlying question is whether that is a

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factor in a record rising to 20 or 30 that you have or have not taken into account, that the artist previously had a gold record.

THE WITNESS: I am taking into account that, I took every one. It is harder for a new artist to even make 61.

MR. O'REILLY: Then we have to ask what is a new artist also.

THE COURT: What you are saying then is that artists who have had a prior good track record are more likely to make it to the top?

THE WITNESS: To the absolute top?

THE COURT: To the top 30 which is what we are talking about.

THE WITNESS: What I am saying is that the artist who has already had acceptance has a much easier time making it, moving quickly past 61 than the new product on the market by a new artist or concept.

If I can continue that, the new artist or concept that does make 61 is far more valid than the artist because the artist is only there because he had a reputation.

THE COURT: That is a factor that is involved in getting to 30?

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THE WITNESS: It shows far more significance for a new artist to be up in that position because he has had to come and move on the record itself and it is not any past reputation.

THE COURT: Just give me a yes or no on this, is it a factor in reaching 30 that the artist has had

THE WITNESS: Is it a factor? It is one of many, many factors, yes.

#### BY MR. AMABILE:

- Q Does your chart indicate the name of the distribution company involved?
  - A No. Billboard does not.

previous success of some substance?

Q Your chart which is what we are talking about does not indicate whether it is a large distribution company or a small distribution company or a group of four small priests involved, does it?

MR. O'REILLY: He already testified, your Honor.

- A I testified as to the Billboard chart if you want to hear that.
  - Q Your chart does not indicate that?
  - A Whether there were four small priests --
- Q Which record companies were involved in the distribution?

about that that on the average songs that get up into the upper 30 per cent have amassed a number of stars or bullets somewhere along in their career and this one had not and there is no showing from this chart as to what bullet any received to determine whether even the 65 per cent reaching 30 is valid.

So I am not sure that that is a good figure but I am forced to conclude that at best the jury would have to speculate not basing any conclusion upon something they could reasonably found their conclusion on, be required to speculate if they were to determine if this would have reached 30.

I will not let the jury speculate and that means
I don't have to reach the easier question if the jury
speculates would I let some witness come along and based
upon that speculation base another expert speculation as
to what bookings he might have done for this group in that
year.

All right, do you want to get the jury in?

MR. O'REILLY: I except to the whole thing.

THE COURT: Exception noted.

(Jury present.)

MR. O'REILLY: Will you mark this, please?

start a new type of work.

That group is called a Pious Society. After

25 years it can apply to be called a congregation such

as the Marykn oll Fathers. They are a congregation, they

are not a religious order. They are all canonical

differences within the church.

We fall under the category of a Pious Society.

Now, when you are ordained, it depends what

you are ordained for.

Do you remember when I mentioned about the secular priests versus the priests belonging to a religious order? A secular priest is ordained through a Bishop in that Dioceses. He takes the vow of chastity. He doesn't take the vow of poverty because priests can have their own money. Diocesan priests --

- Q I can quickly summarize this -MR. O'REILLY: You are not testifying.
  THE COURT: Let's continue.
- Q As I understand it, when you were ordained by the Bishop of Guana, you took a vow of chastity, you did not take a vow of obedience or of poverty, is that correct?
  - A Right.
- Q Were you later in some way released from your vow of chastity in the Roman Catholic church?

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Q Do you recall that?	
A Yes.	
Q The next question put:	İ
"Q Has Father Coyne taken such a vow or	İ
poverty?	1
"A Yes."	
A Yes.	İ
Q Do you recall that?	1
A Yes.	1
Q Then the next question put to Father Berkery	1
was:	
"Q And has Father O'Reilly taken such a	İ
vow of poverty?	1
"A Yes."	1
A Yes.	İ
Q You recall his saying that?	1
A Yes.	
Q All right, sir.	
Hold it. Read what was Deloit 1000	1
a promise. That's why I made that distinction to read the	1
2	١
entire part in, your Honor.	١
25 MR. O'REILLY: No. your	
	O'Reilly - cross O Do you recall that? A Yes. O The next question put: "O Has Father Coyne taken such a vow of poverty? "A Yes." A Yes. O Do you recall that? A Yes. O Then the next question put to Father Berkery was:  "O And has Father O'Reilly taken such a vow of poverty? "A Yes." A Yes. O You recall his saying that? A Yes. O All right, sir. Hold it. Read what was before it. The vow was a promise. That's why I made that distinction.  MR. O'REILLY: He has the obligation to read the entire part in, your Honor.  THE COURT: Wait. You can do it on redirect. MR. O'REILLY: No, your Honor.

\* \* \*

COURTHOUSE

1	gab-12 O'Reilly-cross 809
2	your Honor. I think we are understanding different
3	things by that question.
4	THE COURT: Following the reviews, the promotion
5	
6	because of the reviews.
7	THE WITNESS: Absolutely not, and they did
3	the contrary.
9	Q When was it that you were having these daily
10	meetings with Mr. Martell concerning the promotion of Virgin
11	A From the moment the contracts were signed back
12	in August up through and I said almost daily, I didn't
13	say daily up through this presentation of Virgin, which
14	was a month later, and after that also.
15	Q How often after that?
16	A Fairly often.
17	Q Could you give us an estimate, every day, every
18	other day?
19	A When we had specific meetings?
20	Q Yes, with Martell.
21	A Let me say this if this helps: Far less on a dai
22	basis than we did before the presentation at Philharmonic.
23	Q Did there come a time when you requested and Mr.
24	Martell agreed that you could have the priests move into
25	office space adjourning his office space?
ĺ	

(本)、発送者で、実施がいてきて、金融の対理を表すから、事業を表現しまり、

"Accepted and agreed to, Contemporary Mission by Father

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John O'Reilly."

1	arjb 3	O'Reilly - cross 918
2		Do you recognize that?
3	A	Yes, I do.
4	Q	Did you receive that letter?
5	A	Did I receive the letter?
6	Q	That is the question.
7	A	No.
8	Q	How do you recognize it then, sir?
9	A	From a meeting in Mr. Martell's office.
10	Q	Did you first see it then and there?
11	A	Yes, sir. It was typed up then and there.
12	Q	Did you sign it then and there?
13	A	Yes, sir.
14	Q	That is your signature?
15	A	Yes, sir.
16	Q	Indicating that you accept and agree to those
17	terms of	the letter, is that not true?
18	A	Yes. Can I finish reading it, sir?
19	Q	Surely.
20		(Pause.)
21	A	Yes, sir.
22		MR. LAWLESS: I offer this in evidence.
ಚ		MR. O'REILLY: No objection.
244,		(Defendant's Exhibit K for identification received
<b>25</b>	in evider	nce.)

MR. LAWLESS: May I read the first part of that letter? I will read the whole letter if I may. It may be easier for the jury to follow it.

THE COURT: All right.

(Defendant's Exhibit L read in part.)

Q I ask you to explain to the jury the nature of paragraph 1 of this agreement as it arose in your discussi with Mr. Levy.

A Surely. I was having a meeting with Mr. Martell and Mr. Levy in Mr. Martell's office regarding the performance of Virgin at the Village East. As I testified before, we were performing a concert there at Village East and the promoter there had been running short of mone in his costs for advertising.

At a previous meeting with Mr. Martell we agreed that Famous Music was going to help promote this. I was trying to get the moneys that Famous promised us and Tony explained to me, he went into the situation I have to get approval for things, I have to put them in certain categories.

So he said, "I will tell you what, we will type up this letter for you." I mentioned that the man needs the money and in fact we were waiting for the other half of our money.

us."

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He said, "I will type up a letter that will cover

I said, "Okay, you can type up a letter that will cover us as it comes out of Famous' advance against Virgin."

In fact we were even going to talk about making a loan if we couldn't get it as a promotion.

Q Just restrict it to this paragraph if you would, sir.

A You asked me to explain the conversation wherein this paragraph came from the letter if I remember correctly, and that is what I'm doing. I want to give the full picture here.

O Please do.

A Okay. So I said, "Fine."

Aaron I believe had his secretary type up the letter and could I see the paragraph you are referring to?

- Q Paragraph 1.
- A He said -- all right, I can read.
- Q I'm just showing you paragraph 1, that is all I'm showing you at this time. We are going to take it paragraph by paragraph.

The language of paragraph 1 is before the witness.

THE COURT: You asked to see paragraph 1.

THE WITNESS: I would like to see the whole

25

1	ooa
1	arjb 6 O'Reilly - cross 921
2	exhibit then.
3	MR. LAWLESS: I am showing paragraph 1, your
4	Honor.
5	MR. O'REILLY: Your Honor
6	THE COURT: Put another question. Take the
7	exhibit.
8	THE WITNESS: Him take the exhibit?
9	THE COURT: If you want to, Mr. Lawless, you con-
10	tinue to conduct the examination the way that is appropriat
11	for you.
12	MR. LAWLESS: The witness asked to see paragraph
13	1 of the letter and I am showing him the letter bent so he
14	can read every single word of paragraph 1.
15	THE WITNESS: I would like to see the entire
16	document.
17	THE COURT: Counsel wants to ask you about some
18	of the other paragraphs. He asked me to read it. I would
19	like to read it and I am not playing games with him.
20	Take the exhibit, sir, and put your questions.
21	Q Did the Famous Music Corporation through Mr. Levy
22	in fact give Contemporary Mission \$7,500 as indicated by
23	this letter?
24	A Yes.

Did you in turn or someone in Contemporary Mission

1		a	£	j	b
---	--	---	---	---	---

Α

## O'Reilly - cross

then use that fund to support the presentation of Virgin at the Village East Theatre in New York City?

- A We gave it to the promoter for this, yes.
- O As agreed by paragraph 1?
- A Yes.
- Q Now, we turn to paragraph 2, which I will read to the jury.

"Said sum shall be deemed to constitute a further advance chargeable against any and all royalties accruing to your account of the existing recording and any publishing agreement between us. To the extent that such royalties are not sufficient to repay the said sum or in the event that Virgin shall not run to the end of the current week, the unpaid balance thereof shall constitute a direct obligation of the Contemporary Mission, Inc. to Famous Music Corporation."

Do you recall that being included in this letter?
Yes, sir.

Q With respect to paragraph 3, I will continue to read the letter: Paragraph 3. You acknowledge that Famous Music Corporation shall be relieved of its obligation to expend a minimum of \$50,000 in the promotion of Virgin record sales if, as and when in the sole opinion of the Famous Music Corporation, such promotion shall cease to be

1	, va
1	arjb O'poilly - cross 923
2	effective and profitable.
3	Do you recall that being included in the letter
4	as well, sir?
5	A Yes, sir.
6	MR. LAWLESS: May I circulate that to the jury?
7	(Handed to jury.)
8	MR. LAWLESS: Shall I proceed while they are
9	viewing it, your Honor?
10	THE COURT: Yen.
11	Q I show the witness Plaintiff's Exhibit 34 marked
12	in evidence I believe and these are credit card vouchers
13	signed by John T. O'Reilly en masse.
14	All of these I think you selected out as those
15	which bore your signature.
16	A Yes, that looks like it.
17	Q If you find something out of the way just tell me
18	and I will pull it out.
19	Now, I believe you said on your direct examination
20	yesterday that with regard to many or most of these credit
21	cards I will take the top one off the packet first,
22	which is a Diners card charged to John Thomas O'Reilly,
23	Contemporary Mission dated December 1973 and the establish-
24	ment is Le Joint 3, then code numbers, August 1973. The

total charge is \$36.51 signed John O'Reilly.

H	
1	arjb 7 O'Reilly - cross 953
2	You are not asking me in regard to our complaint
3	but my personal opinion about how much I thought Famous
4	spent?
5	Q How much do you claim they spent for you?
6	A I don't know how much Famous spent. They never
7	showed me anything regarding it as they were required to do
8	by contract.
9	Q You don't know, is that your answer, how much
10	they spent for
11	A I don't know.
12	MR. O'REILLY: Your Honor, he answered the ques-
13	tion.  Q How can you say that they didn't expend \$50,000
14	Q How can you say that they did spend?
15	for you if you don't know how much they did spend?
16	for you if you do o  A We said they did not ever give us a written record
1	as they agreed in the contract to show they spent 50,000
1	within the first year, that is what our complaint states
1	if you will read it.
:	Q Did you just read that letter that you signed
	21 back to Mr. Levy in which you waived and released any claim
	22 they had not expended \$50,000?
	on the assumption that Famous Music say they
	decided, that they deemed this project was no longer work-
	able, which they never did and the release of the two

92a O'Reilly - cross 1 arjb 8 followup singles shows they didn't. Tony Martell himself 2 told me he ripped up that letter, never should have gotten 3 4 me to sign it. THE COURT: Strike the answer and let's start 5 6 again. MR. LAWLESS: No further questions, your Honor. 7 MR. AMABILE: Can we agree that the two exhibits 8 we were talking about, 34 and 46 were marked as P and Q 9 10 in the deposition? MR. O'REILLY: May we approach the bench on one 11 matter I think we need to discuss? 12 13 (At the side bar.) MR. O'REILLY: Now, the only point I want to make 14 that I understand Mr. Lawless represents Famous Music 15 Corporation and that Mr. Amabile is representing the defen-16 dants Gulf & Western and Paramount. 17 . I understand that they both have the right to 18 cross examine any of our witnesses, Father O'Reilly in this 19 20 case. 21

However, I would ask the court to keep in mind the fact that they do not have the right to again go over the same material which was already covered by Mr. Lawless and therefore I want to obviate objections beforehand and that is why I brought this up at the outset.

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	1	* * *
1	gab-18	O'Reilly-cross 986
2	witness.	
3		MR. AMABILE: Counsel O'Reilly, do you plan on
4	saying some	thing?
5		THE COURT: He is objecting to your thanking
6	the witness	•
7		MR. LAWLESS: I guess I am the only one who
8	didn't have	an opportunity to thank the witness. I shall
9	not do so.	
10		THE COURT: All right.
11		Next question.
12	Q	When you and your group were based in St. Louis,
13	I think you	testified that you lived in the ghetto, isn't
14	that correct	<b>:?</b>
15	A	Yes, sir.
16	Q	In fact, you lived in a tenement in the ghetto?
17	A	Yes, sir.
18	Q	How much were you paying in rent?
19	А	\$45 a month for the flats.
20	Q	More than one flat?
21	A	Yes, sir.
22	Q	Total rent was \$45?
23	A	No, the total rent for the four flats was
24	these were t	three or four room flats. There was a dozen of
25	us. The t	total rent was four times that amount \$180,

1	gab-19	O'Reilly-cross 987
2	whatever it	is.
3	Q	Okay. Now there are only six of you, isn't that
4	correct?	
5	A	Yes, sir.
6	Q	You worked with the poor every day when you were
7	in St. Loui	s, didn't you?
8	A	We lived with them if that is what you mean.
9	Q	You ran soup kitchens, for example, didn't you?
10	A	Yes, sir.
11	Q	Gave the people who were hungry food?
12	A	Yes, sir.
13	Q	Gave those who were thirty something to drink?
	A	Well, I don't know if I want to get that biblica
15	about it, s	ir. There were plenty of faucets around.
16	What is the	point? What are you trying to say?
17		THE COURT: No.
18		THE WITNESS: He is being sarcastic.
19		MR. AMABILE: I am not being sarcastic at all.
20	I think it	is
21		THE COURT: Counsel, you have put a perfectly
22	proper ques	tion. I will direct that the witness answer it.
23	A	Did I give drinks to the thirsty? Is that
24	the question	on?
25	Q	Yes.

Q

1	gab-20	O'Reilly-cross	988
2	A	Are you asking me to answer that	t literally?
3	Q	Yes.	
4	A	Did I ever give a thirsty person	n a drink in
5	St. Louis?		
6	Q	Thirsty poor person.	
7	A	Thirsty poor person?	
8	Q	At your soup kitchen, yes.	÷ *
9	A	I can't recall that exact action	of giving a
10	thirsty po	or person a drink.	
11	Q	Did you ever supply clothing to	the poor people
12	A	Yes, sir.	
13	Q	Frequently, didn't you?	
14	A	Yes, sir.	
15	Q	Would it be fair to say that you	r group believed
16	that they should live in an area of need so they could		they could
17	support and	help the neighborhood?	,
18	A	Would it be fair to say that my	group believed?
19	I can't speak for the beliefs of everybody in my life.		n my life.
20	Q	Speak of your own beliefs. Would	d it be fair to
21	say that you believed that?		
22	A	That I believed that or believe	that?
23	Q	Past tense.	
24	A	Okay. That being that I should	live among the
25	poor?		,

		989
1	gab-21	O'Reilly-cross
2	Q	That is correct.
3	A	At the particular time, yes, sir. While we
4	were study:	ing for the priesthood, yes, sir, to train in
	areas of no	eedy, if you want my full answer to the question.
5	0	Then, as I understand it, there were 12 people
6	1!	oup in St. Louis, isn't that correct?
7	in your gr	
8	A	Roughly.
9	Q	Does that mean more or less?
10	A	It means roughly.
11	Q	How many were there in your group in St. Louis?
12	A	About a dozen, sir, as I have testified.
13	Q	YOu don't recall
		It could have been as many as 13, but no more.
14		Then a point in time came when six of you moved
15	11	ord, Connecticut, isn't that correct?
16		No, sir, that is not correct.
17	7 A	
18	8 Q	Seven of you?
19	9 A	No, sir.
2	Q Q	How many of you?
	21 A	I believe it was eight. That is what I testific
2	to the o	ther day.
	23 Q	In Stanford you rented a place to live, isn't th
	24 correct	
	25 A	

1	gab-22		Reilly-cr		990	
2	Q	How much did	the seven	of you pay	y in monthly	ren
3	for this pla	ce in Stanfor	d?			!
4		THE COURT: Ei	gh <b>t.</b>			,
5	Q	The eight of	you, excu	se me.		
6	A	The rent was				
7	Q	Did that rent	ever inc	mase whil	e you were li	vir
8	in Stanford	?				
9	A	Yes, sir.				
10	Q	What was the	maximum r	ent you pa	id in Stanfor	d?
11	A	It increased	to \$900.			,
12	Q	You paid this				
13	A	I don't know	if that i	s when we	moved or not	•
14		THE COURT: \$	900 over w	hat period	1?	
15		THE WITNESS:	A month,	sir.		
16	Q	Per month?				
17	A	Yes, sir.		,		
18	Q	All right.	Your res	idence at	Stanford was	
19	not in a gh	etto, was it?				
20	A	No, sir.				
21	Q	It was 13 ro	oms?			
22	А	About that.				
23	Q	Did it have				
24	A	There was or	e with the	eir proper	ty, yes, sir.	
25	0	Was it near	the water	?		

1	gab-23	O'Reilly-cross 991
2	A	It was near the swimming pool.
3	Q	No other water?
4	A	No, sir.
5	Q	Just the swimming pool?
6	A	Yes, sir.
7	Q	Did you have a boat at all when you were in
8	Stanford?	!
9	A	I believe, yes, sir.
10	Q	What sort of boat?
11	A	18 foot run-a-bout boat where you can go water-
12	skiing from	, sir.
13	Q	Outside of water skiing, what else did you use
14	the boat fo	r?
15	A	To drive around in the water basically.
16	Q	Then there came a time when you and your group
17	left Stanfo	rd and went to Westport, Connecticut, isn't that
18	correct?	
19	A	There was a time when we moved to STanford
20	I mean to W	estport, yes.
21	Q	How many were there in your group at that time?
22	A	At that time?
23	Q	Yes.
24	. А	I think there was seven then .
25		THE COURT: Mr. Amabile, while you are inquiring

.	gab-24	O'Reilly-cross 992
1	•	•
2	of this witr	ness, that Virgin album, is the libretto avail-
3	able for me	to look at?
4		(Pause.)
5	Q	Did you continue to rent when you moved to
6	Westport?	
7	A	No, sir.
8	Q	You purchased the residence?
9	A	We acquired a mortgage, yes, sir.
10	Q	YOu acquired three mortgages I thought?
11	A	Well, in the course of our business relationship
12	with Famous	we did have to remortgage our house, yes, sir,
13	you are cor	rect.
14	Q	It was not three mortgages initially?
15	, <b>A</b>	No, sir.
16	Q	What was the purchase price of the house?
17		MR. LAWLESS: I move to strike that as not
18	having anyt	hing to do
19		THE COURT: Strike it out.
20		MR. LAWLESS: I am speaking for Famous only.
21		THE COURT: Strike it out.
22	Q	What was the purchase price of the house, Mr.
23	O'Reilly?	
24	A	\$250,000.
25	Q	A lot of money?

	ii	1004
1	gab-25	O'Reilly-cross 993
2	A	Not compared to most religious orders.
3		MR. O'REILLY: Objection, your Honor.
4		THE COURT: Sustained.
5	A	The Mcntfort was five million.
6		MR. LAWLESS: I move to strike that as not re-
7	sponsive.	
8		THE COURT: Strike that out.
9	T design	MR. O'REILLY: Your Honor, he asked the quest
10	Q	Have you continued to have contacts with the
11	individual	who sold you the house?
12	A	Yes, sir.
13	Q	Has he been making annual contributions to your
14	organizatio	n?
15	A	No, sir. Not annual, no, sir.
16	Q	But he has been making further contributions to
17	your organi	zation, isn't that correct?
18	A	You mean at this particular point?
19	Q	No, I mean since the time you bought the house.
20	A	He did donate some money to us, yes, sir.
21	Q	Did he actually give you money or was this reall
22	in addition	to the purchase price of the house?
23	Q	Did he actually give me money or was this in
24	addition to	the purchase price of the house?
1	t .	

WEre you giving him tax deductions based upon

Q

## 101a

	101e
1	
2	a fictitious contribution?
3	MR. O'REILLY: Your Honor
4	A Absolutely not, sir.
5	MR. O'REILLY: move to strike it.
6	THE COURT: There has been an answer.
7	Q You indicated that the Westport property covers
8	about two acres, am I correct?
9	A Yes, sir.
10	Q There is a main house and is there also a cottag
11	on the property?
12	A Yes, sir , two-room cottage.
13	Q I see. Is there a boathouse?
14	A A boathouse?
15	Q Yes, a place to keep your boat.
16	A No, sir.
17	Q Is there a dock?
18	A Yes.
19	Q Do you stillhave a boat?
20	A No, sir.
21	Q Did you have a boat at any time when you were
22	living in Westport?
23	A Yes, sir. We lost it because we couldn't afford
24	to keep up the payments.
25	MR. AMABILE: I move that be stricken.

# 102a

1	gab-27	O'Reilly-cross 995
2		THE COURT: Strike it out.
3	Q	Was this the same boat that you had in Stnaford?
4	A	Yes, sir.
5	Q	You only had one boat, though, in Westport?
6	A	Yes, sir.
7	Q	How large is the house in Westport, how many
8	rooms?	
9	A	From 15 to maybe 18, depending on what you con-
10	sider a roo	
11	Q	It has two staircases, a main staircase and a
12	servan ts'	staircase?
13	A	It has a front staircase and a back staircase.
14	We don't h	ave servants.
15	Q	You indicated that you had a certain amount of
16	beach from	t, some of your property is on an inlet, I think
17	you said.	
18	A	Yes, I think I said inlet.
19	Q	Is there a beach there?
20	A	No, I wouldn't call it a beach.
21	Q	Is there sand abutting the water?
22	A	There is dirt and rocks and some pipes
23	Q	How much
24	A	If yo u want to call that a beach.
25	Q	How long is the beach front aspect of your
	-	

1	gab-28 O'Reilly-cross 996
2	property, how many feet, would you say?
3	A About 280 feet, something like that.
	MR. O'REILLY: All of this is relevant to this
5	lawsuit. I take it, to the breach of contract and the
6	issues that we are supposed to be litigating here, is that
7	correct?
8	THE COURT: Your objection, if that is what
9	it is, is overruled.
10	Q Do you go swimming in the inlet, you and the
11	members of Contemporary Mission?
12	A I have, yes.
13	Q Is there a pool at this house?
14	A Yes, sir.
15	Q How large is the swimming pool?
16	A About 30 feet by 20 maybe, 30 x 18. I am not sur
17	Q Did
18	A It is an oval.
19	Q Is the house completely furnished?
20	A Do you mean are there curtains on all the
21	windows, that kind of a thing?
22	Q Is there furniture in all the rooms?
23	
2	the windows aren't all curtained or whatever.
_	O Did the grand piano you spoke about the other

1	gab-29	O'Reilly-cross	997
2	day come wit	h the house or did you buy it separa	te?
3	A	We bought it separately.	
4	Q	What did you pay for the grand piano	?
5	A	We paid \$3000 down and \$200 and some	thing a
6	month.		.4.
7	Q	What was the total price, Mr. O'Reil	ly?
8	A	I believe	
9	Q	No, no	
10	A	YOu want to know what I paid for it?	You
11	didn't ask m	e what the price was.	
12	Q	I just did now.	
13	A	You said no, no, no.	
14	Q	What is the total price of that pian	0?
15	A	Somewhere around nine thousand.	
16	Q	Did you get it at a discount?	
17	40.00 mg mg mg mg mg mg mg mg mg mg mg mg mg	Steinway gives discounts to all reli	gious
18	organization	s. We did get it at a discount.	
19	Q	They gave you a discount because you	told them
20		We told them we are a religious organ	
21		them the tax letters and the proof the	ney are
22	well aware o		
23		Am I correct when you first acquired	
24	•	se your total jonthly payments were	1500 a
25	month?		

1	gab-30	O'Reilly-cross
2	А	I seem to recall somewhere around that in
3	the beginning	g, yes, sir.
4	Q	You personally acquired or had acquired an
5	apartment or	East 57th Street, too, didn't you?
6	A	I rented an apartment there, one room, while
7	we were in h	New York City, yes, sir.
8	Q	You rented that when?
9	А	1974.
10	Q	Under a two-year lease?
11	А	I believe so, yes, sir.
12	Q	Are you still living in the apartment?
13	A	When I am in New York City overnight I am,
14	yes, sir.	
15	Q	Has any member of Contemporary Mission ever been
16	rel ased of	a vow of poverty?
17	A	Has any member of the Contemporary Mission ever
1.8	been releas	ed from the vow of poverty?
19	Q	Yes.
20	· A	Are you asking about temporary or final, perma-
21	nent?	
22	Q	Any vow of poverty.
23	A	Any vow of poverty?
24	Q	Yes.
25	A	Temporary vows run out. You don't get released

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999

words, the material goods are used by you, but you are not

making material goods your end all and be all.

1	arjb 4 O'Reilly - cross 1005
2	A No, sir.
3	Q How many members in 1971?
4	A In 1971 prior to our ordination?
5	Q To your ordination.
6	A In other we lecame associated with
7	them as you spoke about them.
8	Q Other than the members of the Contemporary Mission
9	A How many others?
10	Q How many others.
11	A I thought there were three.
12	Q Are you aware of the fact that Father Krumla
13	promised Bishop Sarpong if he came to ordain you and your
14	confreres he would provide Bishop Sarpong with personnel
15	within five years and also immediately begin sending
16	Rishop Sarpong \$250 a month to be increased after five
17	years?
18	A _ I'm not aware and I don't think the letter states
19	that.
20	Q This is to Bishop Sarpong from Father Krumla:
21	"In return for your kindness in coming
22	to ordain and incardinate the members of Contemporary Mission
23	I would be willing through the institution to provide you
24	with personnel within five years and also would immediately
25	begin sending you on a monthly basis an offening of sasay

begin sending you on a monthly basis an offering of \$250"

1	arjb 15 O'Reilly - cross
2	paid federal income taxes?
3	A No.
4	Q Have they ever paid state income taxes?
5	A Not that I know of.
6	Q To your knowledge this is an affidavit from the
7	Connecticut action in 1972?
8	A Yes. There is a whole story. Would you like to
9	hear it?
10	MR. AMABILE: I ask that that statement be
11	stricken.
12	THE COURT: Strike it out.
13	ρ Mr. O'Reilly, after you saw this affidavit did
14	anybody at Contemporary Mission ever call it to the atten-
15	tion of the Internal Revenue Service?
16	A That statement?
17	Ω This affidavit, yes.
18	A No, because it was a mistake.
19	Q Just yes or no is all we need, Mr. O'Reilly.
20	You ought to know that by now.
21	You told Mr. Lawless this morning are you
22	through shaking your head?
23	A Pardon me, sir?
24	Q You told Mr. Lawless this morning that you had
25	not worn your Roman collar in your depositions in this case

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#### O'Reilly-recross

A I don't believe that this is the whole article, not the article I read. I believe this is part. This isn't even a newspaper here. Somebody took it out and put it together here. It is obvious.

Q This says, doesn't it, that "Two of the documents attesting to the academic and spiritual preparation of the five candidates for the priesthood have been disavowed by their alleged authors." Does it say that?

MR. O'REILLY: Has this been introduced in evidence?

THE COURT: Not yet.

MR. O'REILLY: I object to its introduction.

MR. AMABILE: I haven't introduced it yet.

I will now. I offer it into evidence.

MR. O'REILLY: I object, your Honor, to its introduction.

THE COURT: Gentlemen, come to the side bar, if you will, please.

(At the bench.)

THE COURT: As I understand the order of the proceedings with regard to this subject, upon cross-examination the defendants endeavored to show that there were an enormous number of substantial questions with regard to the ordination and the validity of the priesthood of

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## AFTERNOON SESSION

## 2:30 p.m.

(Jury not present.)

THE COURT: Now, if everybody would sit down for a moment, please.

As I am sure everybody is aware there took place in my presence just before the recess for lunch a very disturbing event. I don't happen to have the minutes here because Mr. Michaelini has the minutes but I had them reread to me again in my chambers over the lunch hour.

I am confirmed in my rereading as to what I saw just before lunch which involved Father John O'Reilly here.

Father O'Reilly, before I impose a fine on you for that, do you want to say anything at this time regarding this event?

FATHER O'REILLY: Yes, sir.

THE COURT: Please do.

FATHER O'REILLY: At the particular time when this happened, your Honor, my fellow priest was on the stand, had never been on the stand before and never been called to do so and isn't the most intelligent of the priests up there. Speaking to the best of his ability, he was being in my estimation intimidated by people walking

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around behind him and leaning on him. This is okay but then I hear people snickering at what this man is saying.

Then I noticed they said that and I know that is the truth, my brother said that to you and at the same time the man said that is a lie. When he said that he is calling a liar and I said -- I don't know my exact words, "You did so do it." I know this is a matter of degree and I have seen other instances go on here. I saw the giving of answers to a witness.

Now, I got up and that is the way I am and I can't help it, that is the way I am. I am not going to let one of my people be ridiculed and that is the way I am and if I am to get a citation, I am sorry. I don't mean to offend people, but I will not allow our group to be -- some of the things that I feel have gone on here, that is my statement.

THE COURT: All right. Let me say this: I don't purport to know because I wasn't there and it really isn't relevant, to know what was happening at the counsel table behind you.

I do want to say that I did not sense in any way that the witness on the stand was being intimidated. I did not in any way sense that the witness on the stand was being ridiculed.

about his being asked what his functions were and the capacity of a mother, it was occasioned in my judgment by the questions, occasioned by the fact that he had asserted on direct examination that he had spent eight to ten hours a day working, every day, on things having to do with Famous Music's promotion and Mr. Lawless was bringing out that given the extensive nature of other duties, including that of taking care of three children, feeding them, dressing them, taking care of them when they came home, school, caring for cars, caring for the house and the lawn, these questions were entirely proper to let the jury see perhaps the witness on the stand was, at best, exaggerating the amount of hours that he claimed to have been working on the Famous Music promotion while he was in Westport.

In my judgment those questions were entirely proper. I saw nothing and I make a flat statement to this effect that anybody could say was an intimidation by Mr. Lawless or ridiculing of this witness in any way.

Now, I want to go back to my other thought and that is this: A number of times over the almost two weeks we have been together there have been admonitions not to speak unless you were addressed a proper question and then to answer responsively. I have had a number of times to

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to gavel the courtroom into silence.

admonish you not to volunteer and to strike out matters that you have volunteered.

There have been a number of outbursts here in which one or more of which you have been a participant.

I have threatened at least in this case once before about finding somebody in contempt if these outbursts continue.

You are not a lawyer, you are merely a witness and an officer of a client in this courtroom. You have no standing to speak except when you are given leave to speak under appropriate circumstances.

This morning at the close of the session we had an incipient brawl on our hands. Your brother rose to charge laughter by counsel, which was the word used, the words were that counsel at the table behind me is laughing.

Mr. Triggs arose and denied that fact vehemently.

I am not going to get into whether it was right or wrong or whether counsel was laughing or whether counsel was not laughing but, at this point, you plunged into action and in a loud, belligerent voice accused him of "I know in fact you have done it," and you had turned around and, as far as I was concerned, there was a gross breach of the decorum and peace of this courtroom. I had to gavel the courtroom into silence.

Now, I cannot permit a brawl to exist in this

did in fact feel intimidated by the questioning.

Father Middendorf is a person with a very low sensitivity if you will. He is an easy-going man and had never been in this situation before.

Whether any of the rest of us might have felt that he was being intimidated is truly besides the point. In fact, he did feel that he was being intimidated.

Now, given the circumstances, and I won't go into the specifics that you have heard, when I rose to speak, I spoke with conviction, let us say. Father O'Reilly evidently observed what I felt I observed. I would submit to the court that under the circumstances what he did was not at all unusual; that he felt he observed the same behavior that I spoke about.

I think that if you were put in his position, are there any of us who wouldn't have reacted basically the same way? Certainly not to precipitate a brawl but to state forcibly his view of what happened?

I understand and I think he now understands that he is allowed to speak in this courtroom unless first granted permission to do so.

I further ask the court to reconsider the assessment of the fine in this case, given the circumstances, the spontaneity of the event and the seriousness of the

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event, at least of the charges, your Honor.

THE COURT: No, whether the witness felt he was being intimidated, I make a finding that I saw nothing from counsel in the least way indicating any intimidation in what was taking place.

Father O'Reilly is not the protector of the /itness on the stand. If he needs a spokesman in his behalf, it is you.

Your brother, John O'Reilly, is not to rise and do battle with you in the courtroom.

MR. LAWLESS: I just want the record to show, your Honor, if I may, that at the time this episode arose I was attempting to cross examine the witness and I was standing somewhere between the first desk of counsel and the witness stand.

I frankly did not hear what did occur. However, let me say in response to counsel's statement that the witness may feel intimidated, that I was pursuing on what I thought was my obligation to pursue the court found. I would like it to appear in the record if I may, your Honor, that at least as far as I know my own voice level, I was not at the time shouting or berating the witness in any way.

MR. O'REILLY: It is a question of close proximity

in this case. There were extended periods of time when Mr. Lawless was standing right up in this area.

THE COURT: I'm not going to get into any of that. I understand what you say and I don't happen to agree with you and my finding stands.

MR. O'REILLY: I understand what you are saying.

I'm trying to say that in this particular person's case,

your Honor, he may feel something that somebody else would

not. I will ask you to take that into recognition.

MR. AMABILE: I would like to indicate for the record that I was standing directly in back of Mr. Triggs and I heard no laughter and I saw no actions which would indicate laughter from Mr. Triggs at the time.

THE COURT: Let us bring the witness in, please.

Over the lunch hour I did some research about

another relevant area and I read to you from McCormack on evidence, page 102 of the second edition.

This has to do with the matter of impeachment and rehabilitation.

"Impeachment is not a dispassionate study of the capacity and character of the witness but is regarded in our tradition as an attack upon his credibility. Under our adversary system of trials the person must be given an opportunity to meet this attack by evidence sustaining

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or rehabilitating the witness. One general principle is

n the absence of an attack upon credibility no sustaining
evidence is allowed. A second truism is where there has
been evidence of impeachment the proponent may bring contradictory evidence asserting the untruth of the impeachment
of facts and such testimony is also relevant and generally
allowable."

Now, given that, I feel that within appropriate limits which I shall impose as we go along, I think that perhaps you may recall Father Berkery to ask him with regard to these matters having to do with the ordination question, if I may put it that way.

I will permit examination in the area subject to such limits I may feel ma, be imposed. This is not to be a broad examination because this is a collateral issue, but I feel that given the scope of the cross examination of Father O'Reilly and the way the jury might assess the facts that we brought out on that, that there should be some opportunity given here pursuant to the treatise text that I have read to rebut that with independent proof if it is indeed available and does not go on at too great a length, because I'm n c going to have two complete trials, one on ordination and one on the Famous Music ase.

Given that, counsel O'Pailly, you may recall

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Father Berkery for the questions in that general area in accordance with my ruling.

I am not certain that I want to do that. I think that the article that we previously discussed, since you have indicated we can introduce that which is what I intended to do anyway, that might be sufficient for our purposes, because we have already introduced evidence that Father O'Reilly was ordained by Bishop Sarpong and I for one don't agree that we should not have a prolonged religious question because I very deeply feel that this is not the proper forum for the resolution of such a question.

The proper forum would be a canonical forum or an ecclesiastical forum, not a civil forum.

At this point, at least, I would like to reserve on it while I think it over a little bit.

THE COURT: You may do that.

MR. O'REILLY: I just want to introduce that one piece of evidence.

THE COURT: That is already in evidence.

MR. O'REILLY: Yes, and I may read some of it at the appropriate time to the jury.

THE COURT: Let's get the jury in and get the witness back on the stand.

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### AFTERNOON SESSION

#### 2:30 p.m.

(Jury not present.)

THE COURT: Now, I don't see any basis whatsoever for having Paramount in this case. I therefore dismiss the complaint insofar as it affects Paramount.

breach of contract, I feel that the Felson case fully applies and even though the Felson case is a little bit unclear as to whether this motion is to be made at the close of the entire case or the close of the plaintiff's case, I have heard in effect the defendant Gulf & Western's position here on the issue of privilege for the ordering of this sale and given therefore what is basically the entire case before me, I dismiss the case insofar as it charges Gulf & Western with inducing breach of contract.

On the claim against Gul. & Western for conversion of certain records, I am going to reserve decision on that claim for the moment.

Turning to Famous, it is to me crystal clear the only way a jury could do anything on the issue of unearned royalties would be to engage in the highest form of speculation and, therefore, the second and fifth causes of

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action that assert a claim for future royalties, I dismiss the complaint as to Famous on the future royalties issues embodied in those causes of actions or wherever else they may be found.

Coming to the question of production and promotion expenses, I conclude they are not allowable under the Virgin contract but they may be recoverable on the reliance for the lost investment theory and it seems to me, therefore, under certain circumstances, I am going to be required to submit those issues to the jury.

However, I am going to require of plaintiff a submission to the court and to the defendant Famous within the next couple of days, certainly before the defendant Famous ends its case, as to just exactly what promotion and production expenses are alleged to have been developed in this record and what they are.

I am totally unable to deal with and I am sure defendant Famous is totally unable to deal with the contentions as are set forth at page 10 of the pre-trial order because I don't remember, obviously, any proof whatsoever as to Brother Palmese; I heard no proof to my knowledge that any of the other brothers who went out were worth \$25,000 for any given period of time for their promotion work. I am not quite clear as to where these various

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#### Gortikov-direct

STANLEY GORTIKOV, called as a witness
by defendant Famous, being first duly sworn, was
examined and testified as follows:

#### DIRECT EXAMINATION

#### BY MR. LAWLESS:

O Your address, Mr. Gortikov.

A 6 North Starr Street, Marina Del Rey, California, 90291.

0 What is your presentposition?

A I am president of the Recording Industry Associatin of America.

Q Will you tell the jury what the Recording Industry Association of America is.

A That is a trade association whose members consist of most of the record manufacturing companies which — and whose members marked about 90 per cent of the records and pre-recorded tapes that are sold in the United States. And as a trade association we are involved in the activities, in the joint activities of these companies, chiefly in respect to industry problems such as piracy work, that is the unauthorized duplication of recordings, legislative matters, tax matters, labor relations matters, matters that are best faced jointly by companies rather than singly.

1	elb-4	Gortikov-direct	1838
2	Q	Does this association represent	only the
3	larger prod	ucers of recordings?	
4	A	No. We have about 50 members, the	e bulk of which
5	are smaller	companies, numerically the bulk	of which are
6	amaller com	panies, although we do include th	e larger com-
7	panies as w	ell.	
8	Q	At any time has Famous Music Cor	poration been a
9	member of y	our association?	
10	A	Yes.	
11	Q	Is it now?	
12	A	No. Famous was absorbed by ABC	Records, which
13	is one of o	our members.	
14	Q	Can you tell historically when t	the Recording
15	Industry As	sociation of America was first fo	ormed?
16	A	It was formed about 25 years ago	·.
17	Q	And it has been in business conf	tinuously since
18	that time?		
19	A	Yes.	
20	Q	Where is the headquarters of the	e association?
21	A	The headquarters is in Los Ange	les and we also
22	have an of	fice here in New York	
23	Q	Your office is where, sir?	
24	A	In Los Angeles.	
25	Q	And your home I think you said	earlier is in

		1270		
1	elb-5	Gortikov-direct		
2	Los Angeles	.7		
3	A	Yes.		
4	Q	Have you agreed to come to this case as an expert		
5	witness wit	h the understanding that your expenses for this		
6	case would	be borne by the Famous Musas Company?		
7	A	Yes.		
8	Q	And you are receiving no fee otherwise, is that		
9	correct?			
10	A	None.		
11	Q	Could we just focus very briefly on your		
12	personal biography. Let's start with high school, if we			
13	may. When	e did you conclude your high school training?		
14	A	In Los Angeles. I graduated high school in		
15	1937.			
16	Q	Did you attend college?		
17	. А	Yes, I went to the University of Southn Cali-		
18	fornia, whi	ch is also in Los Angeles.		
19	Q	What years were you there?		
20	А	1937 through '41. I graduated in '41.		
21	Q	Did you have any honors while at USC?		
22	A	Yes. I was a scholarship student. My		
23	interest a	that time was jorunalism and I was editor of the		
<b>2</b> 4	University	newspaper and I is a scholarship saudent.		

Did you receive any baccalaureate degree from

	125a	
	elb-6 Gortikov-direct 1840	
2	Southern California?	
3	A Yes. I received a bachelor of arts degree in	١
4	journalism.	
5	Q Then what did you do after leaving college?	
6	A I was drafted into the Army.	
7	Q Did you go in the service?	
8	A Yes, I was in the service for approximately	
9	four and a half years, through WorldWar II.	
.0	Q How did you conclude your service, with an	
11	honorable discharge or otherwise?	
12	A With an honorable discharge.	
13	Q What rank did you enter the U. S.Army?	
14	A I was drafted as a private.	
15	Q How did you leave the U. S.Army?	
16	A I was a Lieutenant Colonel.	
17	Q What did you do when you left the Army in 194	16,
18	is that the year?	
19	A Yes. I went to work in the advertising fie	ld,
20	worked for two different advertising agencies, covering	
21	a span of about two or two and a half years. And then	
22	went into the married into the ladies garment busines	s.
23	Q How long were you in the garment business?	

I was in the ladies garment industry for approximately 11 years.

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1	elb-7	Gortikov-direct	1841
2	Q	Was that in the West Coast or the	EAst Coast?
3	A	In Los Angeles.	
4	Q	Did there come a time when you cam	1
5	the recordi	ng industry in any of its phases or	operations?
6	A	Yes. I left the garment industry	
7	of 1960 and	i entered the recording industry in	February
8	of 1960.		
9	Q	What company did you joint at that	t time ?
10	A	Capitol Records, which was based	in Hollywood.
11	Q	What was your post when you first	went with
12	Capitol Re	cords?	
13	A	My title was director of corpora	1
14	II .	sponsibility included undertaking a	I I
15	•	ojects for the company, that is, at	1
16	find other	business for Capitol Records to en	1
17	Q	And then did there come a time wh	1
18	ally worke	ed in the recording side of that bus	iness or not?
19	A	Yes. After about five months in	
20	1	ity I was asked to get into the reco	
21	II .	d became involved in the merchadising	
22	director	of merchandising and advertising and	i market
23	research	for Capitol Records.	
24	0	For how many years were you with	Capitol
25	Records i	n total?	

1	elb-8	Gortikov-direct	1842
2	A	In total, about 11-1/2.	
3	Q	Years?	
4	A	Yes, sir.	
5	Q	How did you serve in the last three	years of
6	your tenure	e at CapitolRecords?	
7	A	After merchandising and advertising	I went into
8	the market	ing aspect of the business and distrib	oution.
9	Was preside	ent of the distributing corporation, w	hich was
10	marketing,	sales, merchandising arm of the compa	iny, and
11	eventually	wound up as president and chief execu	itive
12	officer of	the total company, for the total compa	ny for my
13	last three	years there.	
14	Q	Did you at any time hold any other of	office in
15	Capitol RE	cords before you became its president	and
16	executive	officer?	
17	. А	I was president of the distributing	corporation
18	which was	the marketing arm of the company; I wa	as senior
19	vice-presi	dent of the ocmpany, I was president of	of Capitol
<b>20</b>	Records as	well as Capitol Industries, which is	the parent
21	corporatio	n of Capitol Records.	
22	Q	At any time were you recognized by	an award
23	from the N	ational Association of Television and	Radio
24	Announcers	3?	

I guess it was 1965 I received the

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#### Gortikov-direct

humanitarian aware from that organization.

- Q Have you received any other awards of that kind?
- A Also a humanitarian award from the Anti-Defamation League.
  - O That was in Los Angeles?
  - A In New York.
  - Q What year did you leave Capitol Records, Inc.?
  - A 1971, mid-1971.
  - O What did you do after you left Capitol?
- A I did nothing during the period of June '71 until March of 1972, when I then assumed my present responsibility.
- Q Did you assume initially the post that you now hold as president of Recording Industry Association?
  - A Yes, I did.
- Q How many persons are on your staff or in your employ at present?
- A There are about 15 on the staff and our board of directors includes about 22 different presidents of record companies large and small.
- Q Do you in sum represent the record industry on various occasions?
- A Yes, I generally function as a spokesman for the record industry and I interface in Washington with appropriate subcommittees and committees of the Congress

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position on the chart of 80 -- are you familiar with the

1	arjb 5 Gortikov - cross 1885
2	Billboard charts at all?
3	A Yes.
4	Q Are you familiar with the R&B chart?
5	A Singles charts or album?
6	Q Singles?
7	A Yes.
8	MR. LAWLESS: I object to this line of question-
9	ing on the ground that I did not go into it on the direct
10	examination of the witness.
11	MR. O'REILLY: I think it is certainly within
12	the scope of direct examination because we are talking
13	about the break-even from the number of sales of singles.
14	MR. LAWLESS: He is talking about the chart,
15	sir.
16	MR. O'REILLY: We are trying to give Mr.
17	Gortikov a fuller picture of the situation that is all.
18	THE COURT: Well, I think I will overrule the
19	objection. Go ahead.
20	Q As I was saying, if I were to tell you that a
21	song had sold 50,000 single copies by the time it had
22	reached position 80 on the R&B chart and that
23	MR. LAWLESS: I object; there is no evidence as
24	to that particular hypothetical question, your Honor.
25	MR. O'REILLY: I think there is in fact evidence.

THE COURT: Let us hear the whole question.

Q Would you say first of all that this record in your view had already passed break-even?

A I would have no way of knowing about a given record because it could be that solo guitar player or it could be that massive large group that you described as having undertaken -- the \$100,000 in recording costs.

Q Sure, that is fair enough.

A So it would be impossible for me. I was talking averages and it is just impossible to predict on chart position and sales what the behavior pattern of a given record is.

If it were more predictable, there wouldn't be so many records that are released and fail to recover their costs. Recording companies try to make a profit, they are not trying to lose money on all this massive amount of records released.

Q That is a fair enough answer.

If I were to tell you that a particular song cost the record company as far as production is concerned a maximum of \$1,000, would that help you in your answer?

- A Talking about this song, one side?
- Q This song that I am talking about, yes. Both sides of that single record.

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- A Cost less than \$1,000?
- Q \$1,000? Now, would that help you in your answer whether or not this particular song would most likely have been making money at 50,000 sales?

A It would also depend on a lot of other factors:

How much promotion was put behind the record. So certainly
with that low a record cost it would be highly likely that
the break-even point would have been passed. That is a very
low recording cost.

Q Sure. If I were to tell you further that this particular case when this --

MR. LAWLESS: Which particular case?

MR. O'REILLY: The particular case we are discussing, the hypothetical here.

Q If I were to tell you further that in this case we are discussing the promotion costs to the company were virtually nil, would that help you in your answer as to whether or not they were making money at 50,000 singles?

A Yes.

Q Would you be prepared to say they would in fact be making money?

A I would say it 1 ald be highly likely they were making money.

Q Now, if I were to tell you that this record which

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2 sold 50,000 copies at position number 80 were to continue 3 to move up the chart, the R&B chart, for an appreciable number of moves beyond that, would that to you be any indi-5 cation that this record would be likely to sell more than 6 50,000 copies? 7

It would be impossible for me to predict any relationship between sales and chart movement on the R&B singles chart that you are referring to. It is just impossible to predict. So much depends on the time of the year or the buying pattern going on at the particular time.

A given record, even at number 1 at one time of the year under certain conditions might sell a great many more than the same record number 1 would at a different time of the year.

What is a good time of the year for selling as opposed to a bad time?

Well, for a hot song there is no particular time of the year. Obviously for an album before the Christmas period --

- We are dealing with singles now, sir.
- A Okay, in singles.
- Yes.

It could depend on the general economic conditions that are prevailing at the time.

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It could depend on the dealers being heavily

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inventoried as they often are in the early part of the year.

It could depend on many factors how well a given

song would do at a point in time.

Q Are you prepared to say that it would sell more than 50,000 records that it sold if it continued to move up the chart in an appreciable amount from where it was at position 80?

A If it in fact sold 50,000 at 80 and went on to climb up the chart, it would be most likely that it would have increased sales as it went up the chart, but I can't speak as to the rate.

Q I understand that. Now, if I were further to tell you that as it moved up the chart from position number 80 it accelerated its weekly percentage climb -- do you understand what I mean by that question?

A Right.

Q Would that have any effect on your view as to whether it would have sold even more singles than it normally would have sold?

Is that question clear?

- A That is clear.
- Q Do you understand it?

Okay, you won the war.

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elb-8 Martell-direct

sales?

- A It didn't do anything.
- Q Mr. Martell;, when you say the record didn't do anything, and you have told the jury you meant it wasn't selling, how did you know whether a record was selling, at that time? What information would you receive to show you?
  - A We get the sales figures.
- Q How often would you get males figures in the Famous organization?
  - A I used to get them every day.
- Q Did you keep those sales figures secret from

  John O'Reilly and the members of his group or would you show
  those figures to them?
- A No. Many times Father John used to tell me what the sales were because he was on top of it and he was, you know, in the office and he would see if something significant happened, he would say it to me sometimes before I knew it.
- Q So on a day to day basis they knew, or the information was available to them as to how many of their records were selling, is that correct?
- A Well, it was there. I can't say that, you know, I am not saying that I said Father John, we sold 50

elb-9

 Martell-direct

today or 100, but it was there and I think as I said he knew it. Father John was very intense and he knew it ahead of me.

Q At any time after the Village East production, when sales reports were coming in to you and observed by John O'Reilly, did he make any criticism to you of the promotional efforts of Famous or any of the Famous promo people?

A Oh, yes, very frequently.

Q If you can recall, what was the general nature of his comments about the promotional effort at that time?

A Well, first of all, he just wasn't pleased with

I know he wasn't pleased with Gordon's efforts, and --

Q Just hold it there for a minute. After a trip to Boston did he come to you and complain about the Boston trip in some way?

A I remember that vaguely, but I don't remember what it was.

Q All right, sir. You go back and tell us the nature of the complaints that John O'Reilly was making to you during this period of time?

A Well, he just wasn't pleased with -- he didn't think there was enough effort being extended by Herb Gordon and the promotion staff in general.

elb-10

## Martell-direct

Q What did you do in response to those complaints if anything?

Well, I think, I tried to, if I thought something was -- that FAther John was wrong on something, I tried to direct him on it, and if I thought he was right I went and spoke to the promotion department to get it done. But you see, in the business, if I may interject, in any company whenver something isn't happening, you know, when a record isn't selling, they always blame the promotion man or the marketing department.

And when it is the tell you the record had it in first place, you know, if it is selling. So it is like you are damned if you do and damned if you don't. But if you are asking me, was I pleased with Herb Gordon, I was most of the times. There are times such as we all -- nosbody is perfect, and it is always good to second guess somebody.

Q Going back for a minute, you mentioned that

John O'Reilly had almost on a day to day basis the sales

figures available to nim. Why was that so? Would he

drop into the office during the day or was he in the office

during the eay or what?

A No, let Father John and his people use an office in the building.

1	elb-ll	Martell-direct
2	Q	Was this office in the Gulf & Western Building?
3	<b>A</b>	Yes, it was.
4	Q	On what floor was it located, if you recall.
5	A	SAme floor I was on, 24th floor. In fact, it
6	was two doo	rs away from me.
7	Q	They were two doors away from you?
4	А	I was here and Aaron Levy was here and Father
9	John had th	is office here (indicating).
10	Q	How far away was the Comtemporary Mission office
11	away from )	ou roffice in the building?
12	A	I'd say about
13	Q	In terms of this jury box or the room or
14	А	I would say maybe from here down to the first
15	bench.	
16	Q	Where this gentleman is sitting, in the cinnamon
17	suit?	
18	A	Yes.
19	Q	About that far away from you?
20	A	Yes.
21	Q	During what period of time did the man from
22	Contempora	ry Mission occupy that office?
23	A	I don't remember the exact I know it was
24	for a long	time because I let them do it because we
25	had a Watt	s line in there. They used to make calls, you

10 feet:

	2001
1	elb-24 Martell-direct
2	THE COURT: This gentleman no longer works
3	there.
4	MR. LAWLESS: We are planning to bring Mr.
5	Schlissel in and his testimony will be the document is
6	lost, and we will under the secondary evidence rule offer
7	testimony as to what it contained.
8	THE COURT: I will accept that representation.
9	Q You may answer the question.
10	A At that time it was around 70 some thousand
11	dollars.
12	Q Had been expended by Famous for the Virgin pro-
13	motion?
14	A Yes.
15	Q And that was some time in 1973?
16	A That's right.
17	Q Was any promotion continued after?
18	A That didn't include any local ads that we ran
19	either. That was just money that we paid out.
20	Q Is there any question in your mind as to
21	whether or not \$50,000 was spent on the promotion of Virgin
20	hu Famous?

Absolutely not.

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Martell - direct

- Q There is no question but that it was spent?
- A More than that.
- Q I understand. Now, sir, in the same provision of the same contract, there is a section that states in substance that an individual will supervise the national promotion of Virgin.

Do you recall that provision of the contract?

- A I don't offhand, but if you say it is there --
- Q In substance I say to you that it is there. Will you tell the jury who in fact was supervising the national promotion of Virgi- from the beginning, the person or persons?

A It was actually Herb Gordon who was our national promotion manager. However, I had a lot of input into it because I believed in this music so much.

I must say in all candor at the risk of embarrassing myself maybe, I had worked on Tommy which was the first
rock opera and Jesus Christ Superstar which was the second.
To my knowledge, the only two successful rock operas in
the industry.

I think that when I heard Virgin and I liked it so very much, I think maybe I thought I was Sol Hurok, the great impressario. I thought I was going to really bring this one home, too, and I had every intention. But I think

## AFTERNOON SESSION

### 2:30 p.m.

(Jury not present.)

THE COURT: I have reserved decision on the motion of Gulf & Western to be dismissed on the conversion count. That is the only count open against Gulf & Western at this point.

I am going to grant that motion for the following reasons: That arguably, only arguably as I read it, the contracts were between Famous and ABC and theoretically they could provide a basis -- I won't find it would -- provide a basis for saying that Gulf & Western had directed the transfer and the location and the custody of these records.

I find page 3 of that agreement provides any transfer or assignment to the buyer by the seller of any property or property rights of any agreement which requires the consent or approval of a third party will be made subject to obtaining such consent or approval.

Now, as I read that what Gulf & Western was in effect saying if you assume Gulf & Western is bound by that language, Gulf & Western is saying if there any property that we do not have the power to transfer to any-

arjb 2007

body, that property is not transferred until the property owner gives consent. Therefore, the only way there could conceivably be a conversion here is not by reason of contract but by reason of something somebody allegedly did pursuant to the contract which would be Famous in the actual physical transfer of the assets, arguably.

In addition to that, there is a case by District Judge Irving R. Kaufman, now Chief Judge Kaufman, concerning Lambros Seaplane Base against the Batory, 117 F. Sup. 16, in which the Batory picked up a seaplane off the water I think and carried it off as part of some salvage operation if I remember correctly.

The Batory was charged with converting the seaplane and he ruled in order for there to be conversion, there must be some intentional conduct. It isn't enough to convert some records, it isn't enough that you sold the company, you got to intend some conduct.

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And, finally, Prosser's Torts, fourth edition, page 83, reading, "A conversion can result only from conduct intended to effect the chattel. The intent that is required is intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights."

I find on this record there is no proof whatsoever

arjb

that Gulf & Western intended to exercise any dominion or control whatsoever over anybody's vinyl records.

Given that I conclude that as a matter of law you could not prevail with the jury on the conversion claim and therefore I dismiss the conversion claim as gainst Gulf & Western.

MR. O'REILLY: I take exception, your Honor.

MR. LAWLESS: Exception for the record, your Honor.

If I recall correctly, your Honor also reserved with respect to the conversion claim as to Famous.

THE COURT: The problem I have there is a little more difficult. I will continue to reserve.

One of our jurors is missing.

(Discussion off the record.)

(Recess.)

(Continued on next page.)

\* \* \*

## 146a

2027

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1	elb-2
2	A I don't know what you mean
3	THE COURT: There is no question before you.
4	Q Mr. Martell, I now show you Plaintiff's
5	Exhibit 2, which is the recording agreement which was pre-
6	viously mentioned by Mr. Lawless.
7	A Right.
8	Q I ask you, first of all, did you sign this con-
9	tract?
10	A Yes, sir.
11	Q And I ask you, secondly, did you personally
12	handwrite this page which is known as the rider?
13	A No, it is not my writing.
14	Q Do you know who did?
15	A No, I don't.
16	Q What about this writing right here? Do you
17	know who wrote that?
18	A No.
19	Q Is this your signature?
20	A Yes.
21	Q Turning now to Paragraph 14 of the agreement,
22	
23	nationwide promotion of the sale of these records?
24	A Herb Gordon.
	O Did you indicate that to Father O'Reilly,

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use the office?

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#### Martell-cross

A It was pretty early in the game, but I don't remember the exact time.

Q Would you try, it may be important.

A I really can't say, because after we released Virgin, you know, the rock opera, FAther used to come in a lot, and all the other, you know, the other priests used to come in. And how it all came about is, I used to have a male secretary and --

MR. O'REILLY: Your Honor, I am not sure this is relevant.

THE COURT: This bears on it.

Q Go ahead. We certainly want to know what the whole story is.

A He had that office, and I could never get used to a male secretary. And as a matter of fact if I may say in an aside, when he would come on my side of the desk, I used to get on the o ther side. But I finally had -- we just couldn't work that way together, and he left. And that office was vacant. That is how that office came about, that Father O'Reilly was using.

Q I think we were talking about the designation of a personal overseer, and you were saying that you and Father O'Reilly had a rather close working relationship, is that fair to say?

#### Martell-cross

A I would say.

Q Would you please continue, then, with your recitation as to how Contemporary Mission was informed that Mr. Gordon had been appointed as personal overseer?

A I don't think I sent a formal announcement to everybody saying, you know, this is to advise you that Herb Gordon had been designated. Just by virtue of his title as national promotion manager, that was his responsibility. However, the whole company knew, coming from me, that I wanted every effort put forth on this. I was even one of the overseers, especially in the beginning.

and appoint a personal overseer, are you now saying that

Mr. Gordon is that man or are you saying that you are that

man, or are you saying that both of you or somebody else

is that man?

A What I am really saying is that everybody -there was more effort and more overseeing done on that than
on anything in the company.

Q Mr. Martell, is it accurate to say then that you never told Contemporary Mission that any individual had been designated as the personal overseer? Is that correct, sir?

A I would say it probably is, Bill -- Mr.

- 1			1
		151a	2032
1	elb-7	Martell-cross	
2	O'Reilly	,	*
3	Q	Thank you, that is responsive.	
4	1	MR. LAWLESS: I don't think he fi	nished his
5	answer yet.	<b>.</b>	
6	1	R. O'REILLY: It is a responsive a	nswer.
7	N.	IR. LAWLESS: We didn't hear it.	
8	7	THE COURT: You may deal with tha	t on redirect.
9	Q Y	ou mentioned Mr. Gordon as being	the national
10	promotion dir	ector, I believe.	i
11	A F	ight.	
12	QI	direct your attention, Mr. Marte	11, to
13	Paragraph 16	of this agreement, which states,	"Within the
14	first two yea	rs of this agreement Famous agree	s to release
15	at least four	separate single records from the	work.
16	Mission shall	have the right to approve the con	mpositions
17	selected for	these releases."	
18	מ	o you recall that general understa	anding, Mr.
19	Martell?		
20	A I	think I do, but a lot of that is	boiler-
21	plate.		

No, that is sufficient for now. Q

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With respect to that particular paragraph did there come a time when the Mission indicated that the first single they wished released was Got to Know?

Martell - cross

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	arjb	2
	self	•
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elf.

Why did you feel --

THE COURT: Do you have a recollection of this conversation that you have been asked about?

THE WITNESS: No, I don't, your Honor. I really don't.

THE COURT: Go ahead.

Q Do you recall Father O'Reilly asking you how they were going to reimbursed for all the expenses they had undergone with respect to Fear No Evil and with respect to Together (Body and Soulin'), with respect to the promotion of those songs?

A No. The only thing I vaguely recollect is that I think Father O'Reilly may have had some things ready or some releases or something, singles and albums, I don't know, that he paid money to have completed.

Q Under the Crunch agreement?

THE COURT: Wait, let the witness finish his answer.

MR. O'REILLY: But I want to make that clear.
THE COURT: Please.

A He said, "What is going to happen now?"

I said, "It is up to ABC." I didn't know where

I stood so how could I tell him where he stood?

I couldn't say that.

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# 155a

1	arjb 7	Mart	tell - cross		2052
2		AR. LAWLESS: I ob	ject to that,	there is	no
3	claim for	it.			
4	A	After the sale was	made I was -	-	
5		MR. LAWLESS: Just	a minute, pl	ease. I	object
6	to the que	stion as irrelevant	<b>:.</b>		
7		AR. O'REILLY: I	would say it	is in no	way
8	irrelevant				
9		THE COURT: This is	the questio	n of what	value
10	is to be a	ssigned to these re	ecords at som	e point s	hortly
11	after the	sale?			
12		AR. O'REILLY: That	is correct.		
13		AR. LAWLESS: For	nat purpose	only?	
14		THE COURT: That is	what I unde	rstand.	That is
15	the only b	asis on which I am	admitting it	•	
16	Q	Were you aware that	some 1700 a	lbums were	e sold
17	in Clevela	nd, Virgin double a	albums sold i	n Clevela	nd as
18	cutouts?				
19	A	No, I wasn't.			
20	Q	You heard nothing a	about that?		
21	A	I knew they were go	etting rid of	selli	ng off
22	merchandis	·.			
23	Q	whom do you mean by	they?		
24	A	ABC. Famous did no	ot sell them.		
25	Q	Oo you know whether	r ABC sold an	y Virgin	recordings

1	arjb 8 Martell - cross 2053
2	at all at, as we term it, cutout value?
3	A I can't say specifically Virgin but I know
4	I'm trying to talk louder I know there was some mer-
5	chandise sold.
6	Q That would be Famous
7	A Not Famous didn't sell it.
8	Q That wasn't my question. That would be Famous
9	Music Corporation inventory such as Paramount?
10	A That's right.
11	Q Any Crunch inventory sold?
12	A It could have been.
13	THE COURT: Do you know that it was is the ques-
14	tion.
15	THE WITNESS: No, I don't know.
16	THE COURT: All right. It is only speculation.
17	MR. O'REILLY: He did know that some were sold,
18	he just can't identify them.
19	THE COURT: He says some unidentified merchandise
20	which is not connected with your client at all was sold.
21	He is unable to say whether it is your client or wasn't
22	your client.
23	MR. O'REILLY: You can't say that it is not
24	connected. We don't know whether it was connected accord-
25	ing to Mr. Martell's testimony.

You thought they should be signed up?

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1	* * * elb 2080
2	Contemporary Mission, Inc.
3	-vs- 74 Civ. 4945
4	Famous Music Corporation, et al.
5	
6	New York, New York. May 26, 1976 - 10:10 A.M.
7	May 20, 1570 10120 11111
8	' ' ' ' ' ' ' ' ' ' ' ' ' ' ' ' ' ' '
9	(Trial resumed.)
10	(In open court; jury present.)
11	(in open source, jusy process)
12	MR. TRIGGS: The Defendant Famous calls Mel
13	Schlissel as its next witness.
14	MELVIN SCHLISSEL, called as a witness by
15	the defense, being first duly sworn, was examined
16	and testified as follows:
17	DIRECT EXAMINATION
18	BY MR. TRIGGS:
19	Q Mr. Schlissel, by whom are you now employed?
20	A I am employed by Atlantic Recording Corporation,
21 22	which is a division of Warner Communications, Inc.
23	Q What is your position there?
24	A I am assistant comptrolle.
	Q How long have you been employed at that company?

1	elb Schlissel-direct 2081
2	A December of 1974.
3	Q By whom were you previously employed?
4	A Prior ro that by Electra Records, which is also
5	a division of Warner Communications, Inc., and prior to
6	that, by Famous Music Corporation.
7	Q For how long were you employed by Famous Music
8	Corporation?
9	A From August of 1971 through March of 1973.
0	Q What was your position at Famous Music Corpora
1	tion?
2	A Vice-president of finance.
3	Q Did you hold that position for the entire time
4	of your tenure there?
5	A Yes.
6	Q Could you briefly describe for the jury the
7	nature of that job, what your functions and duties were?
8	A My primary functions were the responsibility
19	of all the cash going out and keeping the necessary record
20	and the reporting of all transactions for the corporation.
21	Q To whom did you report?
22	A To Tony Martell, president of the corporation.
23	Q Did this job entail from time to time the
24	preparation of reports indicating what had been spent on
25	a particular artist or particular group?

		160a	
1	elb	Schlissel-direct	2082
2	A	Definitely, yes.	
3	Q	How often would you be required to	o do this, let
4	say in a gi	ven year?	
5	λ	Many, many times.	•
6	Q	How would you go about preparing	a report, this
7	report of s	summary situation of whatever you s	pent and
8	promotion i	for a particular artist?	
9	A	By searching the records of the a	ccounts payabl
10	Q	Was there a record to which you c	ould go
11	which would	d be sort of a master file which wo	uld indicate
12	how much ha	ad been spent on a particular artis	
13	A	There was no master file, to my r	
14		ethod was to search the accounts pa	
15		were spent, and in this manner you	
16	how many de	ollars are being spent for a specif	
17	Q	How would you know which accounts	payable to
18	look to to	find an expenditure?	
19	A	Seeing where the checks you ar	
20	the checks	themselves, seeing the checks being	g signed by
21	myself.		
22	Q	Are you familiar with the rock op	erat Virga
23	and the Co	ntemporary Mission, Inc.?	
24	A	Yes.	

Did there ever come a time when you were asked

1	elb	Schlissel-direct 2083
2	by someone	at Famous to prepare a report or summary of
3	what had be	en spent in promoting the rock opera Virgin?
4	A	Yes, I did.
5	٥	Can you place when that occurred, as best you
6	can?	
7	· A	Some time in January or February of 1973.
8	Q	You prepared such a report?
9	A	Yes, I did.
10	Q	To whom did you give the report at Famouse?
11	A	I believe I gave it to Tony Martell.
12	Q	Do you have a copy
13		MR. O'REILLY: Objection go ahead.
14	Q	Do you have a copy of that report in your
15	possession	at the present time?
16	A	No, I do not.
17	Q	Let me just take you back, a minute, Mr.
18	Schlissel.	Do you remember when you and I first met and
19	discussed t	his case?
20	A	Yes.
21	Q	How long ago was that?
22	A	Three, four weeks ago.
23	Q	Do you remember how long we chatted?
24	A	15 minutes.
25	0	In that conversation did you mention to me this

report that you had prepared for Mr. Martell with regard to expenditures on Virgin?

A Yes, I did.

Q I will ask you now, do you know anyone else who would have received a copy of that report?

A Mr.Aaron Levy could have possibly received a copy of that report too, who was executive vice-president of Famous Music Corporation.

Q But you at the present time donot have in your possession a copy of that report?

A No, I do not.

MR. TRIGGS: Mr. O'Reilly, will you accept my representation that upon being told by Mr. Schlissel of the existence of this report I called ABC in Los Angeles and requested that a search be made, that I personally prior to this indication by Mr. Schlissel of the report received permission from ABC and went to a warehouse where records are stored, with both a paralegal and a former Famous Music Corporation employee, that I personally or people under my supervision and control searched through those records and that that task was done again when Mr. Schlissel confirmed the existence of this report, that we have looked through files of Mr. Schlissel, Mr. Martell, and Mr. Levy, or those files that we could find containing

those names, also Mr. Sigorsky, Mr.Schlissel's assistant, and that as of last night we were unable to find an original or copy of this document.

MR. O'REILLY: Your Honor, this is the first we have heard of any attempted search in this regard, and the parameters are what I would point out, that Mr. Schlissel indicated he left in March of 1973. That means that there is a period of at least a year and a half before the sale when there has been no indication whatsoever of custody and control after Mr. Schlissel left, assuming that in fact the report was done at that time.

I think that there would have to be a showing that the report as of July of 1974 was still available in order to bring in this representation that Mr. Triggs just made about going to ABC and searching the records at that point, because we have a full year and a half where there is no explanation as to custody, control and chain of control and accounting.

THE COURT: The only question is that, having learned, having been advised, according to the witness, that there was such a report, within the last six or eight weeks, whether the search for it has been adequate to admit secondary evidence as to its contents under the circumstances.

THE COURT: What does that mean? MR. O'REILLY: I said yes. MR. TRIGGS: Thank you, Mr. O'Reilly.

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	165a
1	elb Schlissel-direct 2087
2	Q Mr. Schlissel, do you have a general recollec-
3	tion of what this report indicate had been spent on the
4	promotion of Virgin?
5	MR. O'REILLY: Objection, your Honor, at this
6	time. I want my objection noted on the record.
7	THE COURT: All right. Mr. Schlissel, let's
8	just be a little bit fuller. You were asked in the
9	regular course of business of the company to make a report
10	on expenses.
11	THE WITNESS: That is correct, sir.
12	THE COURT: What do you do in the course of your
13	business when you make such a report?
14	THE WITNESS: You make an analysis of all
15	expenditures made during the period in relation to the
16	specific assignment of that request.
17	THE COURT: This is something that is done with
18	regard to all artists or most artists?
19	THE WITNESS: Yes, sir.
20	THE COURT: And is done in the regular course
21	of business to see how much is being spent on any given
22	artist?
23	THE WITNESS: Correct, sir.
24	THE COURT: It was done under your super-
25	vision?

MR. O'REILLY: One other objection, your Honor, and that is as I said earlier this is the first we heard of this and apparently the knowledge of this has been in the hands of defendant for at least three or four weeks according to Mr. Triggs himself.

You may recall there was an earlier situation with regard to the cutout record where --

THE COURT: But the issue of how much money was spent has been in the pleadings since the inception, given your statement in the complaint. This is addressed to that.

MR. O'REILLY: There is evidence of which the defendant was aware the past three or four weeks, your Honor, and we were made aware of it this morning.

THE COURT: I don't understand that exclusionary rule.

MR. O'REILLY: Because we didn't have notice that this particular evidence was going to be introduced, your Honor.

THE COURT: But you made certain contentions through Father O'Reilly and that is addressed to that contention.

MR. O'REILLY: Your Honor, we were prevented from introducing evidence --

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1	arjb Schlissel - direct 2090
2	THE COURT: No, now
3	MR. O'REILLY: because we didn't give notice.
4	THE COURT: I understand what you are saying
5	but that objection is overruled.
6	MR. O'REILLY: I take exception, your Honor.
7	THE COURT: You may.
8	BY MR. TRIGGS:
9	Q Mr. Schlissel, do you have a recollection of
10	what this report indicated had been spent on the promotion
11	of Virgin?
12	A The exact details I do not have in mind.
13	Q What is your best recollection of what it indi-
14	cated?
15	A It indicated that approximately \$50,000 was spent
16	on the promotion of the record Virgin.
17	Q You gave this report to Mr. Martell I believe
18	you mentioned?
19	A Yes, I did.
20	Q Sometime in early 1973 that you did this?
21	A Yes, sir.
22	THE COURT: What particular places did you look
23	in order to get this report?
24	THE WITNESS: The accounts payable.
25	THE COURT: You looked through your accounts

payable ledger or bills?

THE WITNESS: Through the details of bills being paid. In addition to which you also had credits coming through from your customers for advertising that you give credit to your customers for the moneys that they have spent on advertising and promoting the record Virgin.

THE COURT: You are paying them?

THE WITNESS: You give by -- in essence you are paying them by giving them a credit.

THE COURT: You give them a credit against purchases?

THE WITNESS: That is correct.

MR. O'REILLY: Your Honor, at this time I would like to make the further objection and that is that since Mr. Schlissel's recollection of this report is based upon the compilation of a series of invoices defendants should be charged with bringing in those invoices or at least having a search for those invoices which make up the alleged total of \$50,000, your Honor.

I see no indication they have done this and they should be required to do this, your Honor, before this would be allowed in.

THE COURT: I think any questioning in those areas could have been discovered before this trial in which

## 170a

1	arjb Schlissel - direct 2092						
2	you ascertain these facts by taking the testimony of Famous						
3	Objection overruled.						
4	MR. O'REILLY: They never brought it up until						
5	today.						
6	THE COURT: Objection overruled.						
7	Q Mr. Schlissel, when again did you leave Famous						
8	Music Corporation?						
9	A March of 1973.						
10	Q So there could have been expenses incurred sub-						
11	sequent to that date which were not included						
12	MR. O'REILLY: Objection.						
13	THE COURT: Sustained.						
14	MR. TRIGGS: I have no further questions.						
15	CROSS EXAMINATION						
16	BY MR. O'REILLY:						
17	Q Mr. Schlissel, you testified that to the best of						
18	your recollection approximately \$50,000 was totaled?						
19	A Approximately.						
20	Q Could it have been less them 50?						
21	A Possibly.						
22	Q Mr. Schlissel, if we just focus on what went to						
23	make up that number that you have testified to, would you						
24	please tell us specifically now some of the items that						
25	you checked in order to arrive at whatever total you						

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#### Martell-redirect

John O'Reilly, either singly or in the presence of Father Berkery or in the presence of anyone else that you, Famous Music Company would pay all of the promotional expenses incurred by the priests?

- A No.
- Q You did not make that statement?
- A No, only for what -- I can only explain it
  this way, if I may, your Honor. For the expenses that
  we authorized, the travel that we went together, and the
  trips that I sent Father O'Reilly on, and that he was very
  willing to go, at no time could I say to give anybody a
  carte blanche and say I will pay for all the promotions,
  just go out there and do it.
- Q Second question, Mr. Martell, is there any question in your mind today, after cross-examination yesterday, but that Famous Music Company spent \$50,000 in excess on the promotion of Virgin?
  - A There is no question in my mind.
  - Q But that they did do so, is that correct?
  - A Yes.
- Q The last question. When I came to see you to see if you might appear as a witness in this case on a voluntary basis, did you tell me that this case was very distressful to you because of the fact that your son had

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.Bl	1	arjb l	Ruppert - cross 2252				
	2	Q	They were to be transferred to ABC?				
	3	A	No, I did not testify to that.	1			
	4	Q	What did happen to them, Mr. Ruppert?				
	5		MR. TRIGGS: Objection, irrelevant.	:			
	6		MR. O'REILLY: No, it is not, your Honor.	•			
	7		MR. TRIGGS: We have been through this before,				
	8	what happens to the people.					
	9		THE COURT: They are the ones working on Fear	-			
	10	No Evil.	Go ahead.	1			
	11	Q	Go ahead.	1			
	12	A	At the time of the sale of the company?	1			
	13	Q	Yes.	!			
	14	A	Obviously the people are no longer employed.	***			
	15	Q	So then who is going to promote Fear No Evil?	i			
	16	А	At this point it would be taken up by whoever	1			
	17	buys the	company.	ŧ			
	18	Q	ABC in this case?	١			
	19	A	Right.	1			
	20	Q	To your knowledge did ABC promote Fear No Evil?	İ			
	21	A	No.	1			
	22	Q	Did you go over this with Mr. Lowenthal	1			
	23	A	Laventhal. Yes, I did.	1			
	24	Q	Did you specifically discuss Fear No Evil?	į			
	25	A	Yes.	i			

is no dispute about them and therefore they are accepted facts as to which everybody agrees. These are such stipulated facts as to which everybody agreed and you are to treat them accordingly.

MR. TRIGGS: This is taken from the pre-trial order filed by all the parties in this case.

"Fact F-8: Famous is at all times herein relevant was a wholly-owned subsidiary of Gulf & Western."

"F-31: Prior to the commencement of this lawsuit Contemporary did not submit written requests to Famous for payment of those expenses for which it claims reimbursement in this lawsuit."

"F-32: Prior to the commencement of this lawsuit Contemporary did not submit to Famous any vouchers, petty cash receipts or other written evidence of expenses for which it claims reimbursement in this lawsuit."

"F-36: Prior to the sale of Famous recording diving sion to ABC Records, Inc., Contemporary did not give written notice to Famous of its alleged failure to perform its obligations under the recording agreement and Crunch agreement."

"F-39: No other live performance of the rock opera Virgin or compositions contained therein has been given by Contemporary other than the performance at

2297 1 elb 2 Contemporary Mission, Inc. 4945 3 74 Civ. -against-Famous Music Corp. 5 6 New York, New York. May 27, 1975 - 10:15 A.M. 7 8 (Trial resumed.) 9 (In open court; jury absent.) THE COURT: Mr. Lawless, you know where you are 10 I am going to dismiss the conversion. 11 at. telling Mr. Lawless, who was obviously tightening up his 12 papers, I am going to dismiss the conversion count, so he 13 can tailor whatever may want to arque. 14 MR. O'REILLY: On what basis, your Honor. 15 THE COURT: I am going to read it now. 16 consideration overnight, the conversion count, which is 17 Count 7, as to which I believe I reserved decision, I am 18 going to grant Famous' motion to dismiss the seventh 19 cause of action for conversion. I conclude that on this 20 record there is no evidence establishing that the plaintiff 21 had the right to possession of the records which were 22 admittedly manufactured by the defendant. 23 The only arguably relevant evidence on that 24

score is a certain letter of October 23, 1973, consisting

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of two pages sent by the defendant stating that the plaintiff was the co-owner of the recording Virgin. But the text of the letter in my judgment indicates that it only was intended to refer to the master tape, rather than to the individual disk.

In this regard, and we are talking now about conversion being a violation of somebody's right to possess, one has to keep in mind that only, that Famous had to have the sole right of possession of these records or it could not have sent them out to distributors to be sold, which it was doing, and had the right to do without any conference whatsoever with the plaintiff.

I also view this letter in the context of the original Virgin agreement, under which in Section 1, the plaintiff conveyed the master tape to defendant, and this is in my judgment supportive of the fact that that letter refers to the master tape rather than to the vinyl disk themselves.

I don't see that that letter in any affects the ownership of the individual disks which the defendant had manufactured and had the exclusive right, necessarily the exclusive right to distribute and transfer title to distributors and retailers and ultimately to the consumers.

As a second ground for this, I conclude that the plaintiff has failed to present any measure of damages that would be other than totally speculative.

On this record there is no way to reasonably estimate how many if any of the records thare the subject of this could have been sold if they had been transferred to the plaintiff at the time the contract was signed, and as I have said before, I am not going to permit the jury here to engage in sheer quesswork in assessing damages.

Finally, as a third ground, even if lost royalties were to provide a basis, a realistic basis for damages, which I don't find they could, I couldn't permit such an award and at the same time be allowing the plaintiff to recover for the expenses that it undertook in producing the records, which is the subject of its other claims, to allow recovery for both lost profits and reliance expenses would be to permit a double recovery and would violate a basic rule of contract law that you can't put the plaintiff in a better position than if the contract had not been breached.

penses, I am not going to permit them in any event to have the jury speculate on lost profits by a conversion action that for other reasons I find dismissible.

ahead.

So gentlemen, I am going to dismiss the seventh cause of action as to Famous.

MR. O'REILLY: May I be heard?

THE COURT: No, I don't see any reason for it.

MR. O'REILLY: Your Honor --

THE COURT: I have ruled on it. You are talking after the fact. You were heard at the time the motion was made at the close of the plaintiff's case.

MR. O'REILLY, But I wasn't heard in entirety yesterday, your Honor.

THE COURT: No, but you were heard at the time the motion was argued, which was at the close of the plaintiff's case.

MR. O'REILLY: Your Honor, may I make -THE COURT: You may make a statement. Go

MR. O'REILLY: Thank you, your Honor. First of all, as far as the ownership is concerned, it is very clear from the October 23, 1973 amendment that we are co-owners and co-sharers in all profits from the recordings and we are co-owners in the Virgin recordings themselves.

THE COURT: You argued this to me last night, Mr. O'Reilly.

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MR. O'RELLLY: Do you want me to recalculate?

I think you ought to. THE COURT:

MR. O"REILLY: I will give you those numbers tomorrow morning, your Honor, and I will take it from the Wall Street Journal if we can get it.

THE COURT: I assume that not having given me anything, the \$7200 figure is an offset.

MR. O'REILLY: We didn't find anything specifically in the record, your Honor, so I am not going to dispute that.

THE COURT: Then I direct a verdict on the counterclaim in favor of Famous in the amount of \$3750.

MR. TRIGGS: Does this judgment also include the \$7500 payment in the November 28 letter?

THE COURT: That is the one it applies to.

MR. TRIGGS: Both, your Honor, if I may explain. The counterclaim that I had made was originally premised upon one-half of the Quality advances and that is the onehalf of the \$7500.

Your Honor remembers at the close of the plaintiff's case I moved and was granted leave to amend my counterclaim to include return also of the \$7500 to which we were entitled as a simple debt under that November 28, 1972 contract which I have, your Honor, if you would

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\* \* \*

you seven written questions and I have them on a single sheet of paper which I will furnish you which you are to answer.

The first question is as follows:

1. Has plaintiff established by a fair preponderance of the credible evidence that Famous breached
the Virgin agreement by failing to adequately promote
Virgin in its various aspects as it had agreed?

In that connection let me just refresh your recollection a little bit as to these exhibits and you may of course have the entire exhibits in the jury room should you choose.

Section 14 of the Virgin agreement reads:

"Within the first year of this agreement, Famous shall select and appoint at least one person to personally oversee the nationwide promotion of the sale of records hereunder. That person shall maintain personal contact with Mission personnel and give weekly reports of the progress of such promotion. In addition, within the first year of this agreement, Famous shall spend no less than \$50,000 on such promotion. The promotion media to be used are to include all media normally used for such promotions, such as trade magazines, radio and TV, posters, flyers, et cetera."

arjb 19

In that connection I read to you Exhibit K which is a letter of November 28th signed by Aaron Levy, vice president of Famous and agreed -- accepted and agreed to on the signature of Father John O'Reilly to Contemporary Mission:

"Gentlemen, we are advancing to you the sum of \$7,500. You hereby acknowledge receipt of the same sum and accept the same upon the following terms and conditions:

"Said sum will be used by you to sustain the running of the stage presentation of Virgin at the Village East Theatre in New York City for the balance of the week ending Sunday, December 3, 1972."

Skipping one paragraph:

You may wish to examine these exhibits and examine them in their entire context and consider them in the light of all the other testimony in the case.

As I said, Contemporary claims that Famous has breached these contractual provisions by failing to appoint

arjb 20 1 the nationwide promoter and by failing to expend \$50,000 2 in the promotion during the first year of the contract. 3 It contends that Famous cut back its promotional staff at some point during this period. 5 Famous denies these contentions and has presented 6 evidence about moneys expended at the opening of the Phil-7 harmonic and the various promotional trips undertaken by 8 Mission members and accompanied by Mr. Martell and re-9 imbursed by Famous. 10 And other expenditures which it said during the 11 first number of months, first six or seven months actually 12 at that point Famous contends were already over \$50,000. 13 Famous emphasizes the personal commitment that 14 Mr. Martell had to the success of the promotion of Virgin. 15 Now, the second question for you to answer there-16 17 fore is: If you find a failure to adequately promote, did 18 that cause plaintiff any damage? 19 That's a very simple question, that second ques-20 21 tion. The third question: 22 23 24

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Did the assignment of the Virgin contract by Famous to ABC cause any damage to plaintiff?

I charge you as a matter of law that Famous

arjb 21

breached the Virgin contract by assigning it to ABC on July 31, 1974 without getting from ABC a written agreement to be bound by the terms of the agreement which plaintiff had with Famous. That is in clause 29 of that contract.

However, I must point out that just because there is a breach of the contract, and I find here that there was one as a matter of law, because there is a breach of a term of a contract, that does not mean that a party is necessarily damaged by that breach.

In this connection Famous contends that even though there were a breach by reason of the assignment, it did not damage plaintiff because in the 22 months between the time the Virgin contract was entered into and the time it was assigned, defendant contends that the Virgin album already proved to be a failure and thus it would not have made any difference even if the contract had not been assigned.

Plaintiff on the other hand argues that the

Virgin album and the single would have been more successful if Famous had continued to promote Virgin and had not
assigned the contract.

You must decide, this is your province, you must decide what the fact is and thus whether any damage was actually caused by the assignment to ABC without getting

arjb 22

ABC's consent to be bound.

As you see, ladies and gentlemen, the first three questions deal with the Virgin agreement. The next three relate to the Crunch contract. Question number 4:

Did plaintiff establish by a fair preponderance of the credible evidence that Famous failed to use "its reason-able efforts consistent with the exercise of sound business judgment" to promote the records marketed under the Crunch label?

I earlier had given you the party's opposing contention in this regard and I'm not going to repeat them at this time.

Question number 5 for you to answer is:

Did plaintiff prove by a fair preponderance of the credible evidence that there was a refusal by ABC to perform the Crunch contract and promote plaintiff's music after the assignment?

I charge you as a matter of law that after the assignment of the contract by Famous to ABC. Famous remained liable for any obliquation that was not fulfilled by ABC.

There has been some testimony here that ABC refused to perform from which you could conclude that ABC refused to perform under the Crunch contract. arjb 23

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But Famous argues even if there was any such refusal, that did not injure the plaintiff because the record business is an exceedingly difficult one in which to succeed and the records covered by the Crunch agreement were not successful with the public and thus would not have made a profit even if ABC had fully performed the contract.

Plaintiff on the other hand aruges, among other things, that one of its singles Fear No Evil was rising on the Hot Soul Singles chart and would have succeeded if there had been continued promotion. You must decide these issues.

#### Question number 6:

and just to refresh your recollection 4 has to do with was there a failure to use reasonable efforts to promote and 5 has to do with a refusal by ABC to perform after the contract was assigned -- if your answer to either of those questions or both of them is yes, did such a breach or breaches of the contract of the Crunch agreement cause the plaintiff any damage?

Again, I wish to point out that just because there is a breach of a term of an agreement, that does not mean that the party is necessarily damaged by that breach.

,,

(Note marked Court Exhibit 2.)

THE COURT: Before we get to this note, may I put on the record that Mr. O'Reilly came into my chambers about 10 or 15 minutes after the jury had retired with the request that I charge "to find a promise to reimburse you might find either that Famous agreed in express language to reimburse plaintiff or before incurring the expenses in promotion plaintiff made clear to Famous that plaintiff expected the reimbursement for its expenditures and that defendant thereafter by assisting and encouraging plaintiff to continue the promotion and so forth."

I have two problems: One, it is too late, the jury has already been instructed.

But further this also urges upon the jury as I see it an estoppel theory and this case was entirely submitted to the jury on a theory of an oral contract, not on estoppel but that there was an agreement, Tony Martell said, "I will pay. Don't worry, Father" -- he put his arm around his shoulder, "Don't worry about those expenses, I will pay."

I am not aware of any argument to the jury that supports this estoppel theory which is what it really urges upon me.

MR. O'REILLY: If you read Mr. Martell's testimony

you have to show that there would have been merit in the recording had it been promoted.

The point is that Famous Music Corporation accepted each and every album and single that we offered to them as being of acceptable quality and that the expenses that we incurred be based upon producing those and, therefore, Famous received the benefit of the bargain so to speak, they got the records which were acceptable to them.

THE COURT: Mr. Lawless has a good point by the find that they didn't find that you failed to promote.

They and that you dropped the ball by putting them in the hands of ABC who didn't promote.

MR. LAWLESS: That is right. It is the last word "and promote plaintiff's music after assignment." That is why I asked the distinction be made.

MR. O'REILLY: The point is they didn't even promote period. ABC didn't and how can the jury make any such determination?

THE COURT: They already have. They made a determination that the records, that the Crunch records were not marketed consistent with reasonable efforts and sound business judgment.

MR. O'REILLY: I would like to again go over by large categories then the amounts involved without fixing a

2A 

# PLAINTIFF'S EXHIBIT 27 THE VIRGIN RECORDING AGREEMENT DATED AUGUST 16, 1972 RECORDING AGREEMENT (pp. 188a-200a)

This Agreement is made as of the last date of execution hereof by and between THE CONTEMPORARY MISSION, INC., of One Mayapple Road, Stamford, Connecticut (hercinafter "MISSION") and FAMOUS MUSIC CORPORATION, INC., of One Gulf + Western Plaza, New York, New York (hereinafter "FAMOUS").

WHEREAS, the members and employees of the MISSION have written, composed, and recorded a dramatico-musical work entitled "THE VIRGIN", and have written and are completing additions to a libretto for that work;

WHEREAS, a master tape record of the work has been recorded on 16-track recording equipment and substantial production costs have been incurred in producing said master; and

WHEREAS, FAMOUS is desirous of making and selling copies of said master, including LP albums with said libretto, and of making and selling records utilizing one or more compositions from said work;

NOW, THEREFORE, in consideration of the mutual covenants set forth hereinbelow, it is agreed between the parties as follows:

## MASTER

MISSION hereby sells, transfers and conveys said master,
 and will deliver said master to FAMOUS upon execution of this Agreement.

## RIGHTS GRANTED

2. MISSION grants to FAMOUS the exclusive right to manufacture and sell throughout the world records made from said master, and

to include in any record albums sold a copy of said libretto.

- 3. MISSION grants to FAMOUS the exclusive right to use, throughout the world, in connection with record sales hereunder, the title "THE VIRGIN".
- 4. MISSION grants to FAMOUS the exclusive right to sublicense to others the rights granted hereunder.
- 5. Absolutely no rights are granted to FAMOUS hereby other than those specified in the preceding three paragraphs.

#### COMPENSATION

MISSION an advance of \$65,000 against royalties earned hereunder. And 30 cm on delivery of complete Mission and work have been sold.

On delivery of complete Mission of said work have been sold.

Together the Agreement covering Aights Patientals, without the Agreement covering Aights Patientals, without the Agreement covering Aights Patientals, without the Agreement covering Aights Patientals, without the Agreement covering Aights Patientals, without the Agreement covering Aights Patientals, without the Agreement covering Aights Patientals, with the Agreement of the Work, Famous additional \$25,000 as a further advance juster release of the work, Famous shall advance to Mission, upon a quarterly against future royalties. In additional 35,000 albums sold, in the excess of 90,000 albums. After the Agreement for Agreement to the Essert with Advances free figures. In the Essert with Advances free figures to pay Mission, as an advance against royalties earned from any sub-licensee, one-half of any advance received by Famous from such sub-licensee, specifically for the

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work only.

- 9. All advances paid to MISSION are non-returnable, but are applicable as an offset against royalties earned hereunder.
- 10. FAMOUS shall pay MISSION a royalty at the following Leas Strange Plane Delucion percentages of 90% of the suggested retail list price of all U.S. sales of disk records and albums (with or without libretto), with the only exceptions being those given in the next paragraph:

Total Number of Records Sold

0 - 100,000

100,000 - 200,000

200,000 - 300,000

300,000 - 400,000

more than 500,000

Total Number of Records Sold

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Royalty Rate
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In no event shall the suggested retail list price of any for Postalia Composation Postages 998 two-record album be less than S11.95 fc 55, 132 11.95. 7 /5

- 11. As the sole exceptions to the foregoing paragraph, in the case of all foreign sales or sales of pre-recorded tape by a sublicensee, or on sales through record clubs or through other direct mail methods, the royalty to be paid to MISSION shall be one-half of the amount received by FAMOUS. Less Union Methods Paragraph, in
- 12. (a) FAMOUS shall not be required to pay mechanical copyright royalties in excess of 2¢ per selection nor an aggregate 50¢ for the entire work.

(b) For the purposes of computing royalties hereunder, MISSION understands that FAMOUS may distribute so-called "freeDies" to its distributors, free of royalties hereunder. Said "freeDies" shall be distributed in accordance with standard industry practices and shall not exceed two records in every 12 (16 2/3%) sold.

## ADDITIONAL OBLIGATIONS OF FAMOUS

- 13. FAMOUS is to give to MISSION 300 albums of the work (with libretto) and 300 copies of each other release of compositions in the work, for promotional purposes and such other uses as the MISSION may see fit.
- shall select and appoint at least one person to personally oversee the nationwide promotion of the sale of records hereunder. That person shall maintain personal contact with MISSION personnel and give weekly reports of the progress of such promotion. In addition, within the first year of this Agreement, FAMOUS shall spend no less than \$50,000 on such promotion. The promotion media to be used are to include all media normally used for such promotions, such as trade magazines, radio and TV, posters, flyers, etc.

- prior to publication or sale of records and libretto hereunder, the libretto, the jacket for any album to be released, and the design of any packaging and art work accompanying the album and the libretto.
- 16. Within the first two years of this Agreement, FAMOUS agrees to release at least four separate single records from the work. The MISSION shall have the right to approve of the compositions selected for these releases.
- 17. FAMOUS agrees that all records manufactured and sold hereunder, and all jackets and packaging therefor, are to contain the following notation: "by the Mission", and that the composer and soloists, as identified by the Mission, are to be listed separately for each composition.
- containers, jackets, and packaging therefor with a suitable copyright notice identifying CONTEMPORARY MISSION, INC. as the proprietor. Furthermore, where simultaneous publication in the U.S. and in a foreign country is necessary in order to assure foreign copyright protection, such as in the case of protection under the Berne Convention, FAMOUS will cause such simultaneous publication and will submit to the CONTEMPORARY MISSION information identifying where, when and how the simultaneous publication occurred.

## ADDITIONAL OBLIGATIONS OF MISSION

- 19. For a period of five years from the date of execution hereof, the MISSION agrees not to re-record the selections embodied in the master transferred hereunder, or to cause any such re-recordation, for any person or company other than FAMOUS.
- 20. Subject to the rights of BMI, MISSION will not restrict the broadcast of any individual selection from said work.
- 21. MISSION will, wherever legally possible, apply for, obtain and maintain, at FAMOUS' expense, a copyright registration in its name for said work and at least half of the individual compositions in said work.
- 22. FAMOUS stall notify the MISSION as to the foreign countries in which it wishes copyrights to be obtained, and in any event shall notify the MISSION of any sale or publication of the records or libretto in advance thereof in any foreign country.

## ROYALTY PAYMENTS AND ACCOUNTING

- 23. Starting February 28, 1973, and every six months thereafter, FAMOUS shall submit to the MISSION the following information for the six month period ending two months earlier:
  - (a) the number of records of each type (album, single release, tape, etc.) sold by FAMOUS and any sublicensee (to the extent that they have been reported by the sub-licensee);
  - (b) the suggested list price for each such type of record;
  - that this information need not be given after a total of \$50,000 in promotional expenditures has been made;
  - (d) the total amount of royalties and/or advances due under this agreement. Payment of the royalties and/or advances due shall accompany this report, together with payment of any expenditures by MISSION which FAMOUS has agreed to pay.in wairing.
  - reasonable notice during normal business hours for inspection by MISSION's independent certified public accountant to determine royalties and/or advances due hereunder, and expenditures for promotion.

\* JAMON Shall De ENTITLED TO RETAIN A DEASONABLE

KESERVE FOR ANTICIPATED - JETUZIN FROM PAVMENTS OTHERS:

Due To Mission (Tw) F

- of which all rights granted hereunder revert to MISSION, Super To Right of Tiks Reference in Pick, 36 of this Article of, 26. Athis Agreement shall terminate immediately upon any act of bankruptcy or insolvency by FAMOUS.
- 27. MISSION shall have the right to terminate this
  Agreement upon 10 days written notice to FAMOUS, upon the occurrence of
  any of the following events:
- (a) Breach of any material covenant or term of this Agreement by FAMOUS, which breach is not cured within the 30 days following such notice; or
- ment, the total of all sales of albums hereunder is less than 7000.

## INFRINGEMENT SUITS

Each party will promptly notify the other of any infringement of the rights granted hereunder which comes to its attention. FAMOUS shall have the exclusive right to file an infringement suit against the infringement within 20 days of its discovery. If FAMOUS fails to do so within the 20 day period, MISSION also shall have the right to file suit for the infringement. Whichever party files such a suit will have the right of controlling the action and must pay its costs. Any settlement made shall be binding on both parties, unless the party objecting to the settlement terms thereafter takes control. of the suit and pays its costs. Any recoveries from such suit shall The Mission Pivideo in accordance wit this contract at their expense, in which case The Mission shall all recoveries There from. YElzin

be divided equally between the parties, after the reimbursement of expenses to the party which has paid them. The proprietor of any copyright being infringed hereby gives his consent to the use of his name and his appearance as a party plaintiff in any such lawsuit.

## ASSIGNABILITY

except in the voluntary sale of FAMOUS' entire business in which the present work is used, or in connection with a merger between FAMOUS and another business organization, or to a majority-owned subsidiary or division of FAMOUS engaged in the same business as FAMOUS, all conditioned upon the execution and delivery to MISSION of an agreement whereby the assignee agrees to be bound by the obligations of this Agreement.

## NOTICES

30. All written notices shall be sent by certified or registered mail to the parties at their respective addresses listed above, or addresses subsequently substituted therefor.

## WARRANTIES AND INDEMNITIES

31. MISSION represents and warrants that it owns said master free and clear of any claim by any person, firm or corporation, and that it has acquired all rights necessary to make the grants and representations hereinafter made with respect to said master.

(Ru) -9- 75- 800

- (b) MISSION agrees to deliver to FAMOUS all masters of the work upon execution of this Agreement and warrants that there are no other masters of the work available.
- music performed in the masters which are the subject of this Agreement was (and, as to masters to be performed in the future, will be) recorded under a Phonograph Record Labor Agreement with the American Federation of Musicians—of the United States and Canada (herein AND WILL AFAN OF Under FAMOUS' agreement with AFM, and the instrumentalists, leaders, contractors, copyists, orchestrators and arrangers performing therein or contributing thereto were (or, as to masters to be performed in the future, will be) paid at no less than the minimum scale required to be paid under said agreement;

## OPTIONS

- 33. MISSION warrants that it has agreements with all persons who performed services in connection with the recording of the work necessary to grant the rights granted herein to FAMOUS and agrees to pay such persons in accordance with said agreements.
- 34. MISSION and FAMOUS acknowledge that the recording of the work has uniqueness sufficient to support injunctive relief with respect to breach of the exclusive rights granted herein.
  - 35. MISSION and FAMOUS hereby agree to indemnify one another against damages due to any material breach of any material warranty or representation given or made herein.

29-10(B) Joh

36. FAMOUS shall have the right to first refuse the motion picture and any cast record album rights in said work, provided that said refusal shall be exercised within 10 business days of its offer by MISSION, and provided that MISSION shall not offer the rights under this paragraph to any third party on more favorable terms without offering such terms to FAMOUS.

#### ENTIRETY OF AGREEMENT

and entire understanding and agreement between the parties and supercedes all other written or oral understandings or agreements; except that this agreement does not cover mechanical reproduction royalties due on records sold hereunder and other publication rights, which are to be covered in a separate agreement.

#### APPLICABLE LAW

38. The law of the State of New York is to govern the interpretation of this contract.

FAMOUS MUSIC CORPORATION

August /4, 1972

CONTEMPORARY MISSION, INC.

August / 6 , 1972

Bv:

Jelescus is hereby granted the exclinicions right to redimente The enjoyinght in the compositions.

Aprenglaced the world and shall pry Personian one-half all mysthis received by Deserves in respectly the compositions in the U.S. after detection

Jepaper To the writes and as admistration for of There on J. 10 % J. puch regalles.

Tought asold

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(and Mission shall nee its best effets to obtain all such compositions.)

Jour Warden

## PLAINTIFF'S EXHIBIT 8 - AMENDMENT TO THE VIRGIN AGREEMENT DATED MARCH 19, 1973 March 19, 1973

Famous Music Corporation, Inc. 1 Gulf + Western Plaza New York, N.Y. 10023

Gentlemen;

Reference is made to the recording agreement between us dated August 16, 1972, in which, among other things, we sold, conveyed and transferred to you a master tape recording of the dramatico-musical work THE VIRGIN, from which you were granted the exclusive right to manufacture and sell throughout the world, records made from said master tape.

Said agreement is hereby supplemented so that there shall be deemed included in the master tape recording conveyed to you a musical composition entitled "Together (Body and Soulin)" featuring the voice of Dorothy Lerner.

In consideration of the inclusion of the aforementioned musical composition in the master tapes heretofore conveyed to you, you agree to pay to us and we agree to accept the sum of \$2,000, receipt of which is hereby acknowledged.

You and we shall have the same rights and obligations under this supplement as were granted under the August 16, 1972 agreement.

Except as otherwise herein specifically supplemented, the August 16, 1972 agreement shall remain unaffected and continue in full force and effect.

Very truly yours,

THE CONTEMPORARY MISSION, INC.

AGGREED TO AND ACCEPTED:

FAMOUS MUSIC CORPORATION

,

By: 1. Dohe

202a

PLAINTIFF'S EXHIBIT 9 - AMENDMENT TO THE VIRGIN AGREEMENT DATED OCTOBER
October 23, 1973 23, 1973

Famous Music Corporation, Inc. 1 Gulf + Western Plaza New york, N.Y. 10023

#### Gentlemen:

Reference is made to the recording agreement between us dated August 16, 1972, in which, among other things, we sold, conveyed, and transferred to you a master tape recording of the dramatico-musical work, THE VIRGIN, from which you were granted the exclusive right to manufacture and sell throughout the world, records made from said master tape.

Said agreement is hereby supplemented so that there shall be deemed included in the master tape recording conveyed to you a musical composition entitled "Fear No Evil", by the MISSION.

In consideration of the inclusion of the aforementioned musical composition in the master tapes heretofore conveyed to you, you agree to pay to us and we agree to accept the sum of \$1.00, receipt of which is hereby acknowledged.

You and we shall have the same rights and obligations under this supplement as were granted under the August 16, 1972 agreement.

Except as otherwise herein specifically supplemented, the August 16, 1972 agreement shall remain unaffected and continue in full force and effect.

Very truly yours,

THE CONTEMPORARY MISSION, INC.

By:

AGREED TO AND ACCEPTED:

FAMOUS MUSIC CORPORATION

Ву:



PLAINTIFF'S EXHIBIT 10 - AMENDMENT TO THE VIRGIN AGREEMENT DATED (pp. 203a-204a) OCTOBER 23, 1973

October 23, 1973

Contemporary Mission, Inc. 285 Saugatuck Ave. Westport, Conn. 06880

letter of agreement.

#### Gentlemen:

This letter will serve as an amendment to our contract of August 16, 1972 and supplement dated March 19, 1973 regarding the work, VIRGIN.

It is hereby understood from this day onward that FAMOUS MUSIC CORPORATION, INC. and CONTEMPORARY MISSION, INC. will be nereby considered co-owners of the recording and co-sharers in all profits derived from the sale of any recording manufactured and sold and distributed by FAMOUS MUSIC CORPORATION, INC. These albums will encompass the double album version of VIRGIN, as well as a single album entitled HIGHLIGHTS OF THE ROCK OPERA, VIRGIN, and all singles released or to be released from either of the aforementioned versions of the rock opera VIRGIN recordings.

It is further agreed that there shall be included in this agreement the master tape recording of the musical composition entitled FEAR NO EVIL, by the MISSION. In consideration of the aforementioned musical composition's inclusion in the single album HIGHLIGHTS OF THE ROCK OPERA, VIRGIN, FAMOUS jointly agree to pay to THE MISSION, the sum of two thousand dollars, which is to be equally shared and considered a cost incurred in the production of the HIGHLIGHTS OF THE ROCK OPERA,

It is further agreed that the cost of manufacturing and production of the album, HIGHLIGHTS OF THE ROCK OPERA, VIRGIN, will be borne by CONTEMPORARY MISSSION, INC. as part of their CRUNCH distribution contract with FAMOUS MUSIC CORPORATION.

VIRGIN, album. This sum is payable upon the signing of this

MUSIC CORPORATION, INC. and CONTEMPORARY MISSION, INC.

It is also understood that all publishing and royalty rights shall remain the same as those already stipulated in the original August 16, 1972 agreement between FAMOUS MUSIC CORPORATION and CONTEMPORARY MISSION, INC. and the supplement thereto dated March 19, 1973.



... 2 -

It is further agreed that all future advertising on any of the recordings included in the recording, VTRGIN, must be jointly approved by both parties. All production and manufacturing costs, it is further agreed, computed for the purposes of determining equally shared profit can only be compiled from the date of this letter of agreement and onward. Any previous costs incurred by FAMOUS MUSIC CORPORATION may not be considered recoupable in virtue of this agreement, except for \$32,500, representing one-half (%) of the original advance paid by FAMOUS MUSIC CORPORATION, which shall be recoupable by FAMOUS MUSIC CORPORATION prior to the payment, if any, of the share of profits. CONTEMPORARY MISSION, INC. shall be entitled to a pro-rata credit for any recoupment already earned by FAMOUS MUSIC CORPORATION against their original \$65,000.00 advance.

Except as otherwise herein specifically supplemented, the August 16, 1972 agreement between FAMOUS MUSIC CORPORATION, INC. and CONTEMPORARY MISSION, INC. and supplement dated March 15, 1973 shall remain unaffected and continue in full force and effect.

Very truly yours,

FAMOUS MUSIC CORPORATION, INC.

By: Wir Wille

AGREED TO AND ACCEPTED:

CONTEMPORARY MISSION, INC.

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PLAINTIFF'S EXHIBIT 26 - TELEGRAM DATED AUGUST 19, 1974 TO (pp. 205a-206a) 6NTES POSTA ABC RECORDS FROM CONTEMPORARY MISSION, INC.

MGMNVND NVN 2-010109E231 03/19/74 western union Mailgram



ICS IPMMTZZ CSP 2123334130 MGM TDMT NEW YORK NY 100 08-19 1107A EDT ZIP 06880

CONTEMPORARY MISSION INC CRUNCH RECORDS 285 SAUGATUCK AVE WESTPORT CT 06880

J LASKR PRESIDENT ABC DUNHILL RECORDS CORP 8255 BEVERLY BLVD LOS YOU ARE ADVISED THAT THE SALE OF PARAMOUNT RECORDS TO ABC DUNHILL CORP IS IN BREECH OF OUR CONTRACT WITH FAMOUS MUSIC CORP YOUR SEIZURE OF OUR PROPERTY FROM THE NATIONAL RECORD MARKET PLACE IS ILLEGAL ANGELES CA 90048 AND HAS CAUSED US IRREPARABLE HARM YOU ARE THEREFORE ADVISED THAT SUIT WILL BE FILED AGAINST ABC DUNHILL CORP IMMEDIATELY CONTEMPORARY MISSION INC CRUNCH RECORDS 285 SAUGATUCK AVE WESTPORT CT

1109 EDT

MGMNVND NVN

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### MAILGRAM SERVICE CENTER MIDDLETOWN, VA. 22645

# THE WEIGHT



Meret nesse Postaten

THIS MAILGRAM WAS TRANSMITTED ELECTRONICALLY BY WESTERM 'INION TO A POST OFFICE NEAR YOU FOR DELIVERY

ABC 8/19/74

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PLAINTIFF'S EXHIBIT 29 - LETTER DATED AUGUST 21, 1974 TO FAMOUS 207a MUSIC CORPORATION, INC. FROM CONTEMPORARY MISSION, INC.

(pp. 207a-208a)

August 21, 1974

Famous Music Corporation, Inc. One Gulf + Western Plaza New York, N.Y.

#### Gentlemen:

In accordance with our Agreement of May 8, 1973, and specifically Paragraph 15 of said Agreement, you are hereby notified that you have materially breached Paragraph 12, among others, of said Agreement in that you attempted to make a contract or other agreement with ABC-Dunhill Record Corporation (ABC Records) creating an obligation or responsibility in behalf of or in the name of the Contemporary Mission.

Sincerely,

Reverend John T. O'Reilly

Contemporary Mission

cc:

Gulf + Western Corporation One Gulf + Western Plaza New York, N.Y.

ABC Dunhill Records Corporation 8255 Beverly Blvd. Los Angelos, Cal. 90048

Famous Music Corporation One Gulf+Western Plaza New York, New York

REGISTERED MAIL
RETURN RECEIPT REQUESTED

2080

#### PLAINTIFF'S EXHIBIT 32 - CRUNCH AGREEMENT WATED MAY 8, 1973

AGREEMENT made this day of May, 1973 by and between FAMOUS MUSIC CORPORATION, 1 Gulf + Western Plaza, New York, N.Y. 10023 (hereinafter referred to as "Company") and THE CONTEMPORARY MISSION, INC., 285 Saugatuck Avenue, Westport, Connecticut, 06880 (hereinafter referred to as "Owner").

It is hereby mutually agreed by and between the parties hereto as follows:

#### 1. As used herein:

- (a) "PHONOGRAPH RECORD" or "RECORD" shall mean and refer to any device, in any speed, on any material now known or hereafter devised, including but not limited to discs, wire, tape and film, utilized for the reproduction of sound.
- (b) "MASTER" or "MASTER RECORDING" shall mean and refer to an acetate, lacquer or wax disc, magnetic tape or wire, or other material or device on which sound, or at the option of Company, a combination of sound and a visual rendition of Artist's performance ("sight and sound") can be recorded pursuant to the terms of this agreement, and from which phonograph records can be manufactured. With respect to "sight and sound" use, Owner and Company agree to negotiate in good faith for a royalty to be retained by Company for the use thereof.
- (c) "ARTIST" shall mean and refer to each and every principal performer presently and hereafter engaged by Owner directly or indirectly in the production of master recordings, or whose performances are embodied in the master recordings acquired by Owner for distribution by Company pursuant hereto. Each Artist shall perform exclusively for Company and Owner during the term of this agreement.
- 2. Owner hereby engages Famous Music to serve as the distributor for the United States of recordings to be manufactured from technically satisfactory master recordings. Owner shall from time to time furnish to Company, within the first year of this agreement, ten all original long-playing albums (not to exceed 10) and fifteen original singles (not to exceed 15)\*. In connection therewith, Owner hereby grants Company the exclusive

\*The foregoing shall not exceed more than 2 LPs for any given Artist during any given year of this agreement.

right and license to manufacture, distribute, sell, promote and otherwise exploit phonograph records from such master recordings to the full extent of Owner's rights therein, for the term of this agreement, in the U.S.

3. The term of this agreement shall commence on the date hereof and continue for a period of one (1) year. Company shall have the exclusive option to extend the term of this agreement for three (3) additional periods of one (1) year each. Said options shall be decred automatically exercised unless written notice to the contrary is given to the Owner at least thirty (30) days prior to the end of the then-current term. Such notice shall be transmitted by certified or registered mail effective the date of mailing. Owner shall retain the right to terminate the full and entire terms of this contract at any time during the term of this agreement, on sixty (60) days' notice, except for any Artist who has attained a chart position in Billboard of 75 or better on a single or 150 or better on an LP:

#### CONTEMPORARY MISSION'S WARRANTIES AND GRANTS

- 4. Owner represents and warrants:
- (a) It possesses and/or will acquire all rights necessary to enter into and fully perform this agreement, including, without limitation, valid and subsisting recording agreements with Artists and all other persons whose services are embodied in the masters delivered hereunder.
- (b) Owner possesses and hereby grants to Company the right to use, publish and permit others to use and publish the name, (legal or assumed), photograph, likeness and facsimile signature of each artist or other individual whose name and likeness Owner would have Company utilize, and to write and publish and permit others to write and publish articles, including biographical materials, of and concerning each artist or other individual to be referred to for advertising and trade purposes in connection with the sale and exploitation of records hereunder.

211a

- (c) Company shall have no obligation to make any payments directly to artists or other third parties and shall have no liability with respect to the manner or extent to which sums paid to Owner hereunder are distributed to artists or others.
- (d) All master recordings delivered hereunder shall have been recorded in accordance with the then current AFM Phonograph Record Labor Agreement and AFTRA Code of Fair Practice for Phonograph Recordings to the extent that either or both of such unions have jurisdiction.
- (e) Owner shall procure and furnish to Company at Owner's expense, all necessary U.S. mechanical reproduction licenses covering selections embodied in compositions, the recordings of which are delivered hereunder.
- artist to perform, directly or indirectly, for the purpose of or master recordings making phonograph records,/am defined herein, for any person, firm or corporation other than Owner (and Company, as its interest exists hereunder) during the term of this agreement or any extension or renewal hereof. It will not license or authorize, or permit artist to license or authorize any other person, firm, or corporation to use Artist's name, likeness, facsimile signature, voice or any other form of identification during the term of this agreement or any extension or renewal hereof in connection with the making, advertising or marketing of any phonograph records, as defined herein; and Company may, in its own name or in Owner's or Artist's name, take all steps which Company deems necessary to prevent such use.
- (b) Owner will consult with Comapny concerning Owner's release plans sufficiently far in advance to enable Company to anticipate the manufacturing and distribution requirements in

connection with records released hereunder. Company shall not, however, be required to manufacture any records the lyrics of which fail, in Company's judgment, to meet appropriate standards of decency or which would be offensive to any substantial portion of the public, or of an artist who is involved in a situation bringing such artist into public disrepute or which would in Company's judgment shock or offend any substantial portion of the market or community. Company snall nave the sole option to release nationally phonograph records based on the masters furnished by Owner to it. Otherwise, Company snall release recordings other than nationally after consulting with Owner. Company\*

upon the Owner's designated label, which Owner warrants and represents is solely owned by Owner and is duly protected regarding its use. Owner shall be solely responsible for any and all recording costs, artist and producer royalties or other costs, expenses or payments in connection with the production of masters of an artist (as differentiated from the costs of pressing and selling records therefrom, which are Company's obligations). As used herein, "recording costs" shall include, without limitation, all sums due or paid to artist, instrumentalists, vocalists, arrangers, orchestrators and copyists, and all sums due or paid in respect of studio, engineering and related facilities and services.

(b) Records produced hereunder shall be released only

- 6. Owner will deliver to Company fully mixed and edited monophonic and two-track stereophonic master tapes of each master recording as soon as practicable after the recording thereof, together with a suitable audition copy thereof in disc or tape form. At the same time, or as soon as possible thereafter, Owner shall furnish Company with:
- (a) Any and all biographical information available to Owner concerning the artist;
- (b) Any and all credits and other information required to be given or appropriate for use in connection with the release of records to be produced from such master recordings;
  - (c) The mechanical licenses hereinbefore mentioned.

 Owner shall offer to Company master recordings containing performances of artists engaged by Owner or master recordings to which Owner has acquired distribution rights, and the first opportunity to distribute records based on such master recordings. In this connection, Owner shall not have the right to sell or license to other parties the right to distribute recordings as aforesaid unless and until Owner shall give Company notice in writing, together with a copy of the master recordings for Company's consideration. After receipt of such notice, Company shall have thirty (30) days to elect to acquire the distribution rights under the terms of this agreement. If Company elects not to distribute records based upon the masters furnished to Company, Owner may license the distribution rights to a third party licensee on terms and conditions not more favorable to such third party licensee than those offered to Company or those contained in this agreement. Owner shall not license such rights upon any terms more favorable to such third party licensee without first, again, offering such recordings to Company upon such terms.

#### COMPANY'S WARRANTIES AND GRANTS

- 8. Company hereby undertakes to manufacture, distribute and sell phonograph records derived from such master recordings, and to this end:
- (a) Company will secure the facilities and services necessary to manufacture records and to fabricate packaging thereof;
- (b) Company agrees to use its reasonable efforts, consistent with the exercise of sound business judgment, to develop the market for and effect the sale of records covered by this agreement;
- (c) Company further agrees to expend at least \$3,500 worth of advertising per long-play album or singles derived therefrom, or a pro rata cumulative annual allowance of \$3,500,

multiplied by the number of LPs released, up to 10 LPs, in the form of local, national, point of sale, and trade advertising, posters, etc., such advertising to be mutually agreed upon between Owner and Company. In the event of any dispute between Owner and Company with respect to the foregoing, Company shall have the final approval for all advertising. Said money is to be expended at Company's expense and recouped solely through the Company's distribution fee set forth hereunder.

- 9. In full consideration of its appointment as distributor and the rights granted to it hereunder, Company shall account to Owner thirty days following the end of each calendar quarter, however, no sooner than 75 days after close of the month of initial release of any master recording hereunder, a sum of money equal to the wholesale price at which Company shall have sold all records hereunder during such quarter annual period, less Company's normal reserve policy and further deducting:
  - (a) Cash discounts;
- (b) Company's direct costs of manufacturing all records shipped (including the fabrication of packaging therefor and the manufacturing cost of "free goods" and other free, Disc Jockey and other promotional records distributed). Manufacturing costs deductable hereunder shall be limited to 50 cents in respect of a single-disc LP package and 12 1/2 cents per single record shipped during period, both standard as to materials and design. If the packaging costs in respect of any LP exceed the current level (average of 10¢) or if pressing costs in respect of any LP exceed the current level, or if the combined pressing and sleeve costs of any "single" record exceed the current level, any and all such overages shall be added as a further deduction from the proceeds of records shipped and billed hereunder.
- (c) A distribution fee equal to 15% of the suggested retail selling price of records sold during such quarter, which fee Company shall retain for its own account; and

- 10. Owner expressly retains the sole and exclusive right to negotiate and conclude all agreements for the licensing, distribution and other disposition outside of the United States, as well as distribution through record clubs, direct mail, tape and premium sales, of recordings manufactured from the master recordings. Owner agrees to conclude such agreements as soon as practicable after +he execution of this agreement. In recognition of such efforts as Company may expend in the distribution of recordings in the United States, Owner agrees to account and pay to Company thirty days after Owner's receipt of such monies, sums equal to 1/2 of Owner's net receipts in connection with the foreign distribution, tape, record club, direct mail, premium, etc., of Owner's recordings hereunder during the term of this agreement, excluding advances paid to Owner in all territories except Canada, where Company shall be entitled to 1/2 of all advances and royalties paid and/or payable to Owner, after deduction of bona fide royalties due Artists and independent producers. Company shall from time to time be entitled to inspect Owner's contracts with Artists and independent producers for the purposes of verifying applicable royalty rates, terms and other conditions relevant to this agreement., and Owner agrees to furnish Company with executed copies of such contracts reasonably after execution thereof.
  - 11. This contract is personal to Owner, and Owner shall not have the right to assign this agreement or any of its rights or obligations hereunder, nor shall this agreement or any of Owner's rights or obligations hereunder vest in any other person, firm or corporation, in any receiver or trustee, or by reason or operation of law or otherwise.

- 12. This agreement shall not be construed as one of partnership or joint venture, nor shall it constitute either party as the agent or legal representative of the other.

  Neither party shall have the right, power or authority to make any contract or other agreement, or to assume or create any obligation or responsibility, express or implied, in behalf of or in the name of the other party or to bind the other party in any manner for anything whatsoever.
- 13. Company shall have six months from the last date of (or termination by Owner pursuant to Par.3 this agreement or any extension or renewal hereof to sell off the recordings distributed by it hereunder based on the masters furnished by Owner, after which masters are to be returned to Owner, or at instructions of Owner, destroyed by Company and a certificate of destruction shall be furnished to Owner by Company as evidence of destruction.
- 14. All notices required to be given hereunder shall be in writing and sent by registered mail to Company at 1 Gulf + Western Plaza, New York, N.Y. 10023 and to Owner at the address aforesaid, or to such other address as either party may hereafter designate. Notices shall be deemed to have been given on the date of mailing.
- and no act or failure to act shall be deemed a material breach hereof unless Owner or Company shall first deliver to Company or Owner a written notice specifying the alleged failure to perform or alleged act or alleged failure to act constituting such claimed material breach and Company or Owner shall have failed to cure the material breach within thirty (30) days after receipt by Company or Owner of such written notice.
- 16. This agreement sets forth the entire agreement between the parties with respect to the subject matter thereof, and no modification, amendment, waiver, termination or discharge of this agreement or any provisions thereof, shall be binding upon

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either party unless confirmed by a written instrument signed by an officer of at ty, No waiver of any provision of or default under this agreement shall affect either party's rights thereafter to enforce such provision or to exercise any right or remedy in the event of any other default, whether or not similar. This agreement and all of its provisions shall be interpreted and construed everywhere in accordance with the laws of the State of New York, applicable to a contract executed and fully to be performed therein.

- 17. It is specifically acknowledged and understood that the above contract shall not become effective or bind the Company until executed and delivered by an authorized signatory of each party. According'v, the above contract shall not be deemed a memorandum in writing executed by a party to be charged under the Statute of Frauds. Neither the submission thereof nor any conduct of the parties including the execution by only one party, oral statements or payment by Company in contemplation of execution shall bind either party or be deemed part of an offer capable of acceptance by the others.
- 18. This written Agreement constitutes the whole and entire understanding and agreement between the parties and supercedes all other written or oral understandings or agreements.

WHERDFORE, the parties hereto have executed this agreement as of the date first above mentioned.

FAMO	ous	MUSI	C CORI	PORATION	4	
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THE	COI	NTEMP	ORARY	MISSIO	J, 1	NC.
By						

This Agreement is made as of the last day of execution hereof by and between FAMOUS MUSIC CORPORATION, INC. (hereinafter called "FAMOUS"), of One Gulf and Western Plaza, New York, New York and THE CONTEMPORARY MISSION, INC. (hereinafter "MISSION"), of One Mayapple Road, Stamford, Connecticut.

whereas, on August 16, 1972 the parties entered into a "Recording Agreement" regarding a work entitled "VIRGIN", with a hand-written, abbreviated split-publishing agreement attached as a rider to the Recording Agreement;

WHEREAS, MISSION acknowledged receipt of a \$35,000.00 advance pursuant to paragraph 6 of said Recording Agreement, and said paragraph 6 of said Recording Agreement requires FAMOUS to pay another \$30,000.00 advance upon the delivery of completed master tapes and the completion of certain other obligations;

WHEREAS, MISSION has fulfilled the foregoing obligations of paragraph 6 of said Recording Agreement and is entitled to receive the further \$30,000.00 advance but MISSION will use its best efforts to cause all writers and composers to execute the standard form of certificate of originality of FAMOUS;

WHEREAS, the parties wish to supplant said abbreviated split-publishing rider agreement with a more detailed agreement;

NOW, THEREFORE, in consideration of the mutual covenants set forth hereinbelow, it is agreed between the parties as follows:

## DEFINITION OF TERMS

- 1. (a) As used herein the term "Musical Compositions" means the music, lyrics and notations of the musical compositions now or in the future comprising the dramatico-musical work entitled "VIRGIN" (hereinafter referred to as the "WORK").
- (b) FAMOUS shall be deemed to refer to ENSIGN MUSIC CORPORATION, the BMI publishing affiliate of FAMOUS, without affecting the obligations of FAMOUS hereunder.

## 2. MISSION warrants that:

(a) The musical compositions are the original work of its writers, the compositions and the copyrights therein do not infringe upon, violate or unfairly compete with the rights of any third party, and there are no adverse claims to said musical compositions, except pursuant to MISSION's license with BMI, and except for the compositions entitled, "Becoming One" and "Temple Turning Time" in which

the copyrights are being reacquired by MISSION, FAMOUS to own an undivided one-half interest in the copyrights therein and MISSION and the former owner each to own an undivided one-quarter interest therein. The publisher's share of income from the reacquired compositions shall be distributed by FAMOUS in accordance with the aforesaid undivided interests of the copyright proprietor (after payment of appropriate writer's royalties) in accordance with the accounting provisions of this agreement, but including, without limitation, the following:

- (b) MISSION will not enter into any agreement or perform any act which diminishes or is inconsistent with the rights granted to FAMOUS prusuant to this Agreement; and
- (c) MISSION has the full right and power to enter into this Agreement.

#### GRANT

- 3. MISSION hereby assigns and conveys to FAMOUS an undivided one-half interest, during the term of this Agreement, in:
- (a) The musical compositions, including the title, words and music thereof, and all right, title and

interest therein, and the copyrights thereof and the right hereafter to secure copyrights therein throughout the world, and any and all Denefits, revenues, monies or income accruing therefrom, and all rights of whatsoever nature under the copyrights therein now or hereafter existing, subject to the provisions of this agreement reserving certain rights to the MISSION.

- (b) The right to publish, copy and sell printed copies of the musical compositions, including the titles, lyrics, and music thereof;
- (c) The right to administer the copyrights in the compositions shall be entirely in FAMOUS, including the right to grant licenses to use the same in printed versions, to perform the same, to grant mechanical copyright licenses to manufacture recordings thereof in every media, and the right to collect any and all income from any exploitations of the musical compositions throughout the world subject to payment to MISSION as herein provided, and the right to appoint sub-publishers throughout the world, including affiliates and/or subsidiaries of FAMOUS.
  - (d) MISSION does, by these presents, hereby irrevocably constitute FAMOUS or its designees its true and lawful attorney in MISSION's name and in MISSION's place and stead and/or in the name of FAMOUS to make, sign, execute, acknowledge and deliver any and all instruments and documents FAMOUS deems necessary or desirable to carry out its administrative functions hereunder or to evidence or establish the rights of FAMOUS and MISSION in the musical compositions. MISSION shall cooperate (without expense to MISSION) at the request of FAMOUS, and shall execute assignments and other documents in accordance herewith to evidence the rights of the parties hereto in the musical compositions.

- been done by MISSION in filing claims to copyrights in connection with the compositions and preparing appropriate materials in connection therewith. All such materials shall be turned over to FAMOUS and it shall be the responsibility of FAMOUS thereafter to file all appropriate copyright documents in the joint names of the parties and at the expense of FAMOUS. FAMOUS shall keep MISSION informed of its filings in the United States and shall consult with MISSION's legal representatives concerning the initial copyright filing in the United States.
- 4. (a) FAMOUS shall not enter into an agreement permitting the use of any of the musical compositions for radio or television commercials of products other than the musical compositions or recordings thereof without MISSION's written consent.
- (b) FAMOUS, upon the written request of MISSION, shall license the use of the musical compositions in all dramatic performances thereof, such as stage presentations, concert and dramatic performances, plays, operas, oratorios, motion pictures and the like; sychronization rights, and motion picture rights provided that the fees for such uses shall be in accordance with industry practices and shall not

be reduced by concessions in related arrangements granted to user by MISSION; provided that FAMOUS shall have the options granted in paragraph 36 of said Recording Agreement, and that income from the exercises of the rights under this paragraph 4(b) will be divided pursuant to this Agreement. FAMOUS shall not license dramatic presentations of more than three musical compositions in one dramatic presentation without MISSION's prior written consent.

- (c) No rights are transferred hereby other than those specifically set forth herein with respect to the musical compositions. For example, the right to write a book or other literary work using the story, character; or title of "VIRGIN" is reserved to MISSION. Nothing in this agreement shall be deemed to grant any rights to FAMOUS in the underlying dramatic work of the "VIRGIN", which are acknowledged to be the sole property of MISSION.
- 5. In the event that either during, or subsequent to the term of this agreement MISSION desires to enter into an agreement pursuant to which a motion picture version of the work is to be produced, FAMOUS agrees that it will execute, without additional compensation, such instruments

and agreements (including a synchronization license) with respect to the rights in the musical compositions as MISSION shall desire to make with a motion picture company, providing such license shall provide a reasonable fee in accordance with industry practices, as set forth in paragraph 4(b) above.

reasonable restrictions with respect to the use of the musical compositions and their respective titles in, or in connection with, other motion pictures, television productions, and radio and television commercials, as MISSION shall be willing to agree to in the proposed contract with a motion picture company, subject to whatever outstanding rights that may have been granted by FAMOUS prior to such time as notice of the execution of the proposed contract shall have been given to FAMOUS.

#### COMPENSATION

6. As full consideration for the rights granted to FAMOUS pursuant to this Agreement, FAMOUS agrees to pay MISSION, and MISSION agrees to accept (in addition to the writer's share of royalties, as hereinafter defined) fifty percent (50%) of the publisher's share of net receipts actually received by FAMOUS with respect to uses of the musical compositions, other than with respect to composite works issued by FAMOUS comprised, in part, of the musical compositions.

- 7. For the purposes of this Agreement, the publisher's share of net receipts shall be computed as follows:
- (a) All monies actually received by FAMOUS in the United States deriving from the publication or other use of the musical compositions shall be deemed to be gross receipts; and
- (b) From such gross receipts, there shall be deducted, in the order herein set forth, the following:
- (i) The writers share of royalties with respect to the musical compositions.
- (ii) A sum, equal to ten (10%) percent of such gross receipts, to be retained by FAMOUS as an administrative fee for its overhead, office salaries, promotional expenses and general office expenses.

As an example, assume \$100,000.00 is received by FAMOUS in the United States. First, fifty (50%) percent (\$50,000.00) is deducted from gross receipts (assuming fifty (50%) percent is the applicable writer's share) and is payable to MISSION for payment to the applicable writer(s). Next, ten(10%) percent of gross receipts

(\$10,000.00) is deducted and retained by FAMOUS as its administrative fee. Finally the remainder, forty (40%) percent of gross receipts (\$40,000.00) is to be divided equally between MISSION and FAMOUS (except with respect to the two reacquired compositions).

- (c) The remainder (after the aforesaid deductions) shall be considered the publisher's share of net receipts, to be divided as provided in this agreement.
- 8. With respect to composite works issued by FAMOUS comprised, in part, of the musical compositions, FAMOUS will pay MISSION an amount equal to a pro-rated share of five (5%) percent of the net wholesale selling price of each such composite work sold in the United States embodying one or more of the musical compositions, for which FAMOUS has received payment. MISSION shall be entitled to that portion of the said five (5%) percent as the number of musical compositions embodied in a composite work bears to the total number of compositions contained therein in which FAMOUS has a royalty interest.

- 9. The writers share of royalties shall mean, with respect to the musical compositions:
- (a) In respect of regular piano copies sold and paid for in the United States and Canada, a royalty in no event to exceed six (6¢) cents per copy, according to the following schedule;

Fifteen (15%) percent of the wholesale selling price of the first 100,000 copies or less, but in no event less than two and one-half (2 1/2¢) cents per copy; plus

Sixteen (16%) percent of the wholesale selling price of copies in excess of 100,000 and not exceeding 200,000, but in no event less than three (3¢) cents per copy; plus

Eighteen (18%) percent of the wholesale selling price of copies in excess of 200,000 and not exceeding 300,000, but in no event less than three and one-half (3 1/2¢) cents per copy; plus

Twenty (20%) percent of the wholesale selling price of copies in excess of 300,000 and not exceeding 400,000, but in no event less than four (4¢) cents per copy; plus

Twenty-two (22%) percent of the wholesale selling price of copies in excess of 400,000 and not exceeding 500,000, but in no event less than four and one-half (4 1/2¢) cents per copy; plus

Twenty-five (25%) percent of the wholesale selling price of all copies in excess of 500,000, but in no event less than five (5¢) cents per copy.

(b) Twenty percent (20%) of the wholesale selling price for each and every copy of all orchestrations and all other arrangements, including vocal scores and instrumental arrangements of the musical compositions, printed and sold by FAMOUS in the United States, for which FAMOUS has received payment. In the event FAMOUS shall license the printing thereof, writer shall be entitled to that portion of fifty (50%) percent of the net receipts of FAMOUS therefrom in the United States, as the number of musical compositions by writer contained therein bears to the total number of compositions therein in which FAMOUS has a royalty interest.

(c) If the musical composition, or any part thereof, is included in any song book, song sheet, folio or similar publication published and sold by FAMOUS containing at least four (4) but not more than twenty-five (25) musical compositions, the royalty to be paid by FAMOUS to the writer shall be an amount determined by dividing ten (10%) percent of the wholesale selling price (after trade discounts, if any) of the copies sold, among the total number of FAMOUS' copyrighted musical compositions, included in such publication. If such publication contains more than twenty-five (25) musical compositions, the said ten (10%) percent shall be increased by an additional one-half (1/2%) percent for each additional musical composition. In the event one or more of the musical compositions are included in such a publication pursuant to a license granted by Famous, writer shall be entitled to that portion of fifty (50%) percent of the net receipts of FAMOUS with respect thereto as the number of musical compositions by writer contained therein bears to the total number of compositions therein in which FAMOUS has a royalty interest.

- (d) Fifty (50%) percent of all gross receipts of FAMOUS in respect of any licenses (including statutor; royalties) authorizing the manufacture of parts of instruments serving to mechanically reproduce the composition, or to use the composition in synchronization with sound motion pictures, or to reproduce it upon electrical transcription for broadcasting purposes; and of any and all gross receipts of the publisher, FAMOUS, from any other source or right now known or which may hereafter come into existence, except as provided in subdivision (i) of this paragraph. FAMOUS shall not grant mechanical licenses in the United States for less than one and one-half (1 1/2¢) cents per musical composition without the written consent of MISSION.
- (e) Fifty (50%) percent of all sums actually received by FAMOUS in the United States from sub-publishers (whether or not such sub-publishers are affiliates or subsidiaries of FAMOUS) in respect of all copies of the musical compositions sold in any country outside of the United States of America;

- (f) Fifty (50%) percent of all sums actually received by FAMOUS in the United States and any other country from any other sources or rights now known or hereafter coming into existence, and not specifically provided for herein. It is specifically understood that all royalties pursuant to this Agreement are to be computed upon the basis of monies received by FAMOUS in the United States.
- (g) No royalty shall be payable as to "professional material" not sold or resold; distribution of said professional copies shall be independent of the sale of any other musical compositions, services, goods, wares, or merchandise, provided that no profit shall be made by FAMOUS in connection therewith;
- (h) If any copies for which royalties have been paid are returned to FAMOUS, royalties so paid shall be credited to FAMOUS and allowed on the next statement;
- (i) Writers shall not receive as part of the writers share of royalties any part of the fees collected or received by FAMOUS through or from any performing rights society or other collection society such as BIEM, where only the publisher's share of royalties or receipts is paid to FAMOUS;
- net receipts, FAMOUS shall be entitled to deduct from gross license fees paid to FAMOUS by its licensees, a sum equal to the charge paid by FAMOUS to an independent licensing agent, provided such fees shall in no event exceed the amounts then payable under ordinary industry practices. All royalties payable pursuant to this agreement shall be apportioned, when the musical compositions are published together with compositions not subject hereto, upon the same basis provided in paragraphs 8 and 9(b) and (c) above.

k. (i) FAMOUS, in granting bulk or block licenses, shall pay to the writer that proportion of fifty (50%) percent of the gross amount received by it under each such license as the number of uses of the composition under each license during each such license period bears to the total number of uses of FAMOUS' copyrighted musical compositions under each such license during each such license period; in computing the number of FAMOUS' copyrights musical compositions, for this purpose, there shall be excluded musical compositions in the public domain and arrangements thereof and those with respect to which FAMOUS does not currently publish and offer for sale regular pian copies; and with respect to such licenses, FAMOUS shall account to MISSION for the writer(s) as provided herein.

tatives in countries outside of the United States and Canada to use and to grant licenses for the use of the composition on the customary royalty fee basis under which FAMOUS shall receive not less than ten (10%) percent of the marked retail selling price in respect of regular piano copies, and fifty (50%) percent of all other revenue; if, in connection with any such bulk or block license FAMOUS shall have received any advance, then neither MISSION nor the writer shall not be entitled to

any share therein, but no part of said advance shall be deducted in computing the composition's earnings under said bulk or block license. A bulk or block license shall be deemed to mean any license or agreement, domestic or foreign, whereby rights are granted in respect of two or more musical compositions.

- (1) FAMOUS agrees that it will not issue any license for the musical compositions hereunder as a result of which it will receive any financial benefit in which the writers do not participate.
- (m) Providing MISSION has furnished appropriate information to FAMOUS, every license or authorization issued by FAMOUS authorizing the publication of the composition or any part thereof shall contain a provision requiring the user thereof to print, in addition to the copyright notice, the name of the writers as the authors thereof.
- paid to the writers shall be paid to MISSION. Writers royalties shall be divided and paid to actual writers by MISSION as the interest thereof appear. MISSION hereby indemnifies and agrees to hold FAMOUS harmless from any damages (including reasonable attorneys fees) arising out of any claim by a writer in respect of royalties paid by FAMOUS to MISSION in accordance with this agreement. FAMOUS shall promptly notify MISSION of any such claim and MISSION shall be entitled to participate in the defense thereof, at MISSION's expense with an attorney of MISSION's choice.

- 11. FAMOUS shall furnish MISSION fifty (50) copies of the Composition which it publishes and shall use its best efforts to furnish or cause to be furnished to MISSION copies published by others.
- 12. (a) FAMOUS shall render to MISSION semi-annually, on or about the 15th day of August and February of each year in which royalties are actually payable, a statement showing all sales or licenses made or granted pursuant to this Agreement and the royalties payable hereunder for the six (6) month period ended the preceding June 30th or December 31st. Each such statement shall be accompanied by remittance of the sum shown to be due thereon. All such statements, and other accounts which FAMOUS may render hereunder, shall be binding upon MISSION and not subject to any objection by MISSION for any reason unless MISSION shall have made specific objection in writing within twelve (12) months of the date on which such statement was rendered.

- (b) MISSION shall have the right, not more than once each year, upon reasonable notice and during usual business hours, to examine the books and records of FAMOUS concerning payments hereunder.
- (28) years. FAMOUS shall have the right of first refusal, with respect to continuing the term hereof for the musical compositions after twenty-eight (28) years, to be exercised within ten (10) business days after FAMOUS is notified of the terms thereof, and provided that MISSION shall not offer the rights under this paragraph to any third party upon terms more favorable than those offered to FAMOUS without offering such terms to FAMOUS.
- 14. (a) All written notices shall be sent by certified or registered mail to the parties at their respective addresses listed above, or addresses subsequently substituted therefor.
- (b) Each party hereby indemnifies the other against any damages, (including reasonable attorneys fees) arising out of or connected with any breach of the warranties, representations or agreements of the indemnifying party, or from any third party claim inconsistent with such warranties,

representations, or agreements of the indemnifying party.

Any party making a claim hereunder shall notify the other of such claim as promptly as possible after knowledge thereof, and the indemnifying party shall have the right to participate in the defense thereof, at its expense, with an attorney of its election.

- (c) This Agreement shall not be assignable by FAMOUS, except in the voluntary sale of FAMOUS' entire business in which the present work is used, or in connection with a merger between FAMOUS and another business organization, or to a majority-owned subsidiary or division of FAMOUS engaged in the same business as FAMOUS, all conditioned upon the execution and delivery to MISSION of an agreement whereby the assignee agrees to be bound by the obligations of this Agreement.
- registered for copyright in the United States in the name of CONTEMPORARY MISSION MUSIC and ENSIGN MUSIC CORPORATION, at the cost of FAMOUS. FAMOUS shall give the necessary instructions so that all copies of the musical compositions printed in the United States shall bear the following notice in addition to such other matter, if any, as MISSION may deem advisable:

COPYRIGHT (C) (appropriate date)

by CONTEMPORARY MISSION MUSIC and ENSIGN MUSIC CORPORATION

The (P) copyright in the sound recording, under the separate Recording Agreement between FAMOUS and MISSION, shall also be held jointly by the parties thereto, and said Agreement shall be deemed amended to that extent.

16. FAMOUS shall have the right to authorize foreign versions and translations of the lyrics of the musical compositions to be made whenever it deems advisable, provided that copyrights to such foreign versions or translations shall be owned by MISSION and ENSIGN as provided herein.

of the parties hereto and supersedes any and all print under standings, arrangements and agreements between the partie relating to the publishing rights in the Work entitled "VIRCIN". This Agreement cannot be modified, amended, or terminated, except by an instrument in writing signed by the parties hereto. No waiver of any provision of, or default under, this agreement shall affect the rights of the parties to thereafter enforce such provision or to exercise any right or remedy hereunder.

18. This Agreement, its validity, construction and effect, shall be governed by the laws of the State of New York.

FAMOUS MUSIC CORPORATION

September , 1972

THE CONTEMPORARY MISSION, INC.

September , 1972

PLAINTIFF'S EXHIBIT 56 - PLAINTIFF'S CHART CONCERNING THE RECORD "FEAR NO EVIL" (pp. 238a-258a)

UNITED	SI	'A'	res	D	IS	TRIC	T	CC	URT
SOUTHER	IJ	D	ST	RT	CT	OF	NE	W	YORK

CONTEMPORARY MISSION, INC.,

Plaintiff,

-against-

FAMOUS MUSIC CORPORATION, PARAMOUNT PICTURES CORPORATION, and GULF + WESTERN CORPORATION,

X (Judge Owen)

74 Civ. 4945

X FURTHER ANSWERS TO FIRST SET OF INTERROG-

ATORIES PROPOUNDED TO PLAINTIFF

X

Defendants.

2. A. (b) (1) Based upon the attached statistical analyses of the songs which attained position number 61 or better on the "Hot Soul Singles" chart of Billboard trade magazine during 1974, Mr. Levy is prepared to render his opinion regarding the number of records which could reasonably be expected to have been sold when "Fear No Evil" attained given positions on the chart.

The first list is a compilation of all of the songs which attained a position of # 61 or better on the chart during 1974. This is the more comprehensive of the two annexed lists, since it records the advance of a total of 324 songs, as opposed to the 52 songs which are recorded on the second list. Thus the first compilation provides the most comprehensive information possible during the time period when "Fear No Evil" was climbing the charts.

While the second list records the additional climb of each song which had attained position # 61 on a given week during the 52 weeks of 1974, the first list records the further progress made by every some which reached or

passed through position # 61 in a given week during 1974.

During the week of February 9, 1974 for example, five songs which were previously positioned below # 61 reached or exceeded position # 61. It is apparent, therefore, that the second list, while helpful, provides an analysis which is less representative, compared to the first list.

An example of the application of information contained in the afore-mentioned compilation follows. A continuation of "Fear No Evil" up the chart until it reached position # 10 or better would, in Mr. Levy's expert opinion, have resulted in the sale of 700,000 to 1,000,000 single recordings of "Fear No Evil", 250,000 "Virgin Highlights" albums, and 200,000 "Virgin" double albums.

Similarly, a climb of "Fear No Evil" to position

# 20 on the chart would have resulted in the sale of 500,000
to 700,000 "Fear No Evil" singles, 150,000 "Highlight" albums,
and 100,000 "Virgin" double albums.

Likewise, a movement of "Fear No Evil" to position #30 on the chart would, in Mr. Levy's opinion, have resulted in sales of 300,000 to 500,000 "Fear No Evil" records, 60,000 "Highlights" single albums, and 40,000 "Virgin" double albums.

Royalties based on sales of these levels, when combined with mechanical royalties, BMI airplay and so forth, would generate substantial revenues for plaintiff. For example, if the minimum level of 300,000 record sales (together with 60,000 "Highlights" albums and 40,000 "Virgin" double albums) is calculated in accordance with the terms 2 of the applicable agreement, revenues of \$393,500 would flow to plaintiff.

On the other hand, if a corresponding calculation is made based upon a sales level of 1,000,000 records, plaintiff would receive revenues of \$1,902,250.

2. A. (b) (2) Mr. Purcell is prepared to give his expert opinion with respect to anticipated concert revenues from "Virgin", had defendants allowed the record to attain a level of popular recognition commensurate with the aforementioned record sales at position # 30 or better. In view of this level of popular recognition, Mr. Purcell is prepared to testify relative to the following example of a concert tour.

The tour would consist of two main portions, a college campus concert tour, and a theatrical tour.

The college tour would consist of fifty engagements at college auditoriums and/or field houses having a minimum seating capacity of 7500. The average price of tickets would be \$5.00, and on the average 60% of the seats would be sold for each performance. Mission would receive a guarantee of 60% of the gross revenues from each performance. Thus plaintiff would receive \$13,500 before expenses for each performance ( 7500 seats x 60% ='s 4500 seats sold at \$5.00 each ='s \$22,500; 60% (Mission's share) of \$22,500 ='s \$13,500). For fifty performances plaintiff would therefore receive \$675,000. Expenses associated with the tour would

total approximately 33% of \$675,000, therefore resulting in net revenue to plaintiff of \$450,000.

If a more realistic average seating capacity of 10,000 is employed, the average (before expenses) received by plaintiff for each performance would total \$18,000, and the net revenues (after expenses of 33%) to Mission for a concert tour of fifty performances would total \$940,000.

The second portion of the tour would consist of a theatrical tour having a minimum duration of ten weeks at a weekly minimum gross to plaintiff of \$50,000 to \$75,000. When expenses of 33% are deducted therefrom, the net revenues to Mission range from \$330,000 to \$500,000 for a ten week tour.

Therefore, the combined revenues which would flow to Mission from the foregoing college and theatrical tours would range between \$780,000 and \$1,440,000.

Mr. Purcell would also be prepared to testify that a minimum guarantee of \$50,000 would be received by Mission in exchange for the rights to a Broadway play of the rock opera "Virgin".

2.A. (c) (1) Mr. Levy's expert opinions are based upon his extensive knowledge of the record industry accumulated while serving as President of Roulette Records, Inc., for the past fifteen years.

(c) (2) Mr. Purcell's expert opinions are based upon the fact that he has promoted approximately two thousand concerts during the past twenty years.

CONTEMPORARY MISSION, INC.

Sworn to before me this J/ day of November, 1975

Dems PNE/

Notary Public, State of New York 52-4602785 Qualified in Suffolk County Registered in New York County Commission Expires March 30, 1977

# SONGS WHICH ATTAINED POSITION AT LEAST # 61 ON THE BILLBOARD HOT SOUL SINGLES CHART DURING 1974

DATE	SONG	ARTIST	POSITION ATTAIN
1/5	BOOGIE DOWN	EDDIE KENDRICKS	1
1/5	LAST TIME I SAW HIM	DIANNA ROSS	15
1/5	IT MAY BE WINTER OUTSIDE	LOVE UNLIMITED	35
1/5	WANG DANG DOODLE	POINTER SISTERS	24
1/5.	IF ITS IN YOU TO DO WRONG	IMPRESSIONS	26
1/12	I'LL BE THE OTHER WOMAN	SOUL CHILDREN	3
1/12	I WILL	RUBY WINTERS	39
1/12	GIVE ME JUST ANOTHER DAY	MIRACLES	47
1/12	NO TIME TO BURN	BLACK HEAT	46
1/12	IF THAT'S THE WAY YOU WANT IT	SKYLARK	55
1/12	GOTTA FIND A MOTHER	WHISPERS	32
1/12	GETTING TOGETHER	BROTHERS GUIDING LIC FEATURING DAVID	61
1/19	WERE WE GETTING CARELESS WITH OUR LOVE	JOHNNIE TAYLOR	5
1/19	FOR THE GOOD TIMES	STEVIE WONDER	51
1/19	FIRST TIME WE MET	INDEPENDANTS	20
1/19	THERE'S GOT TO BE RAIN IN YOUR LIFE	DOROTHY NORWOOD	21
1/19	YOU'RE SO UNIQUE	BILLY PRESTON	11
1/19	THAT'S WHAT THE BLUES IS ALL ABOUT	ALBERT KING	15
1/26	MIGHTY LOVE (PART I).	SPINNERS	1
1/26	I'D RATHER BE	O.U. WRIGHT	33
1/26	I TOLD YOU SO	DELFONICS	26
1/26	YOU SURE LOVE TO BALL	MARVIN GAYE	13
1/26	FUNKY MUSIC, PART I	THOMAS EAST	52

DATE	SONG	ARTIST POSITI	ON ATTAINED
2/2	TALKING ABOUT THE BOSS & I	HARMON BETHEA	59
2/2	THATS THE SOUND LONELY MAKES	TAVARES	10
2/2	HOMELY GIRL	CHI-LITES	3
2/2	WITCH DOCTOR BUMP	CHABUKOS	39 ,
٤/2	I WISH IT WAS ME	TYRONE DAVIS	11
2/9	I JUST CAN'T GET YOU OUT OF MY MIND	4 TOPS	18
2/9	LOOKIN' FOR ALLOVE	BOBBY WOMACK	1
2/9	GET YOUR THING TO THER	ANNETTE SNELL	44
2/9	IF IT WERE LEFT UP TO ME	SLY & FAMILY STONE	57
2/9	THANKS FOR SAVING MY LIFE	BILLY PAUL	9
2/16	IT'S BEEN A LONG TIME	NEW BIRTH	9
2/16	SWEET DAN	BETTY EVERETT	38
2/16	SO TIED UP	SAM DIES	59
2/16	I NEED SOMEONE	LINDA PERRY	54
2/16	SAME BEAT	FRED WESLEY & THE JB'	s 26
2/23	JUST DON'T WANT TO BE LONELY	MAIN INGREDIENT	8
2/23	OUTSIDE WOMAN	BLOODSTONE	2
2/23	MY MISTAKE WAS TO LOVE YOU	DIANNA ROSS & MARVIN GAYE	15
2/23	BEST THING THAT EVER HAPPENED TO ME	GLADYS KNIGHT & PIPS	1
2/23	TALK TO THE RAIN	SPRING	55
2/23	KEEP IT IN THE FAMILY	LEON HAYWOOD	11
2/23	THROUGH THE LOVE IN MY HEART	SYLVERS	50
2/23	SOUND YOUR FUNKY HORN	K.C. & SUNSHINE JUNKANOS BAND	21
3/2	I WOULDN'T GIVE YOU UP	ECSTASY, PASSION, PAIN	17
3/2	WHEN THE FUEL RUNS OUT	EXECUTIVE SUITE	48
3/2	BEST THING THAT EVER HAPPENED TO ME	PERSUADEPS	29

DATE	SONG	ARTIST POSIT	ION ATTAINED
3/2	WILLIE PASS THE WATER	RIPPLE	27
3/2	NEWSY NEIGHBORS	FIRST CHOICE	35 .
3/2	I GOT TO TRY IT ONE TIME	MILLIE BACKSON	21
3/9	HONEY PLEASE, CALL'T YA SEE	BARRY WHITE	6
3/9	TOUCH A HAND, MAKE A FRIEND	STAPLE SINGERS	3
3/9	TSOP	MFSB	1
3/9	GOIN DOWN SLOW	BOBBY BLUE BAND	17
3/9	WHAT IS HIP	TOWER OF POWER	54
3/9	SHE CALLS ME BABY	J. KELLY & PREMIERS	46
3/16	MIGHTY MIGHTY	EARTH, WIND & FIRE	4
3/16	SWEET STUFF	SYLVIA	16
3/16	POWER OF LOVE	MARTHA REEVES	27
3/16	HEAVENLY	THE TEMPTATIONS	8
3/16	AND I PANICKED	THE DRAMATICS	49
3/16	LOVING YOU	JOHNNIE NASH	40
3/23	THE PAYBACK	JAMES BROWN	1
3/23	WHO IS HE & WHAT'S HE TO YOU	CREATIVE SOURCE	21
3/23	DANCING MACHINE	JACKSON FIVE	1
3/23	PARTY BUMP, Part One	GENTLEMEN & THEIR LADIES	50
3/23	YOU MAKE ME FEEL BRAND NEW	STYLISTICS	5
3/30	TOUCH AND GO	AL WILSON	23
3/30	CARRY ME	JOE SIMON	12
3/30	LET'S GET MARRIED	AL GREEN	3
3/30	CHAMELEON	HERBIE HANCOCK	18
3/30	PEPPER BOX	THE PEPPERS	34
3/30	SUMMER BREEZE (PART I)	ISLEY BROTHERS	10
. 4/6	SATISFACTION GUARANTEED	HAROLD MELVIN & THE BLUENOTES	6
4/6	CAN YOU HANDLE IT	GRAHAM CENTRAL STA.	9
			TO SECURE AND A SECURE OF THE PROPERTY AND AND ADDRESS OF THE PROPERTY OF THE

DATE	SONG	ARTIST	POSITION ATTAINE
4/6	HELP YOURSELF	THE UNDISPUTED TR	UTH 19
4/6	I BELIEVE	THE EBONYS	34
4/6	THAT'S HOW HEADACHES ARE MADE	JERRY BUTLER	58
4/6	THE SAME LOVE THAT MADE ME LAUGH	BILL WITHERS	10
4/6	TIN PAN ALLEY	LITTLE MILTON	51
4/6	BE THANKFUL FOR WHAT YOU GOT	WILLIE DE VAUGHAN	1
4/13	DON'T YOU WORRY 'BOUT A THING	STEVIE WONDER	2
4/13	I'M IN LOVE	ARETHA FRANKLIN	1
4/13	THIS HEART	GENE REDDING	31
4/13	TRIBE	TRIBE	50
4/20	BENNIE AND THE JETS	ELTON JOHN	15
4/20	THE LONE RANGER	OSCAR BROWN, JR.	27
4/20	HEY BABE	THE JONESES	18
4/20	LOVE THAT REALLY COUNTS	NATURAL POWER	23
	PUT A LITTLE TOVE AWAY	EMOTIONS	53
4/27	FOR THE LOVE OF MONEY	O'JAYS	3
4/27	CHICAGO DAMN	BOBBIE HUMPHREY	49
4/27	HOLLYWOOD SWINGING	KOOL & THE GANG	1
5/4	WONDERFUL	ISAAC HAYES	18
5/4	SIDESHOW	BLUE MAGIC	1
5/4	LIFE & DEATH	CHAIRMAN OF THE BOAT	RD 52
5/4	MESSING UP A GOOD THING	JOHN EDWARDS	54
<b>5/4</b>	SWEET RHODE ISLAND RED	IKE & TINA TURNE	R 43
5/4	HONEYBEE	GLORIA GAYNOR	55
5/4	CAN YOU TALK	RON HOLDEN	49
5/11	ONE CHAIN DON'T MAKE NO PRISON	FOUR TOPS	3
5/11	I SLEEPIN'	DIANA ROSS	50

DATE	SONG	ARTIST POSI	TION ATTAINED
5/11	MAKE UP FOR LOST TIME	MONTCLAIRES	46
5/11	GETTING WHAT YOU WANT (LOS1N' WHAT YOU GOT)	WILLIAM BELL	39
5/11	TIME WILL TELL	TOWER OF POWER	27
5/18	SON OF SAGITTARIUS	EDDIE KENDRICKS	. 5
5/18	FINALLY GOT MYSELF TOGETHER	IMPRESSIONS	1
5/18	ARISE AND SHINE	INDEPENDENTS	19
5/18	RHAPSODY IN WHITE	LOVE UNLIMITED	48
5/18	I'M FALLING IN LOVE WITH YOU	LITTLE ANTHONY & IMPERIALS	25
5/18	IT'S BETTER TO HAVE (AND DON'T NEED)	DON CONWAY	21
5/18	TELL ME WHATCHA GONNA DO	GENERAL CROOK	57
5/18	COME DOWN TO EARTH	NEW CENSATION	61
5/25	WHAT COMES UP (MUST COME DOWN)	TYRONNE DAVIS	11
5/25	JIVE TURKEY (PART I)	OHIO PLAYERS	6
5/25	I'M COMING HOME	SPINNERS	3
5/25	TOO LATE	TAVARES	10
5/25	FISH AIN'T BITIN	LAMONT DOZIER	4
5/25	YOU KEEP ME (HANGING ON)	ANN PEEBLES	37
5/25	I WISH IT WAS ME YOU LOVED	DELLS	11
5/25	SHO-NUFF BOOGIE (PART I)	SYLVIA & MOMENTS	45
5/25	ON & ON	GLADYS KNIGHT & PIPS	2
5/25	THAT'S THE WAY IT WILL STAY	TOMORROW'S PROMISE	59
5/25	WILDFLOWER	NEW BIRTH	17
5/25	DISRESPECT CAN WRECK	ESCORTS	61
6/1	IT'S HER TURN TO LIVE	SMOKEY ROBINSON	29
6/1	ROCK THE BOAT	HUES CORPORATION	2
6/1	I'VE BEEN BORN AGAIN	JOHNNIE TAYLOR	13

DATE	SONG	ARTIST	POSITION ATTAINED
6/1	BEHIND CLOSED DORR	LITTLE MILTON	31
6/1	POSITIVE THING	MANDRELL	29
6/8 6-8 6/8	WHERE DO WE GO FROM HERE ROCK YOUR BABY A FUNKY SONG	TRAMMPS GEORGE MCCRAE RIPPLE	44 41
6/8	HOW DO YOU FEEL THE MORN. AFTER	MILLIE JACKSON	11
6/15	WHO ARE YOU	B.B. KING	. 27
6/15	MACHINE GUN	COMMODORES	7
6/15	MY LOVE	MARGIE JOSEPH	10
6/15	MY THANG J	AMES BROWN	1
6/15	YOU'VE GOT MY SOUL ON FIRE	TEMPTATIONS	8
6/15	DAMN RIGHT I'M SOMEBODY	FRED WESLEY & 3	JB's 32
6/22	BALLERO	WAR	17
6/22	YOU'RE WELCOME, STOP ON BY	BOBBY WOMACK	5
6/22	TELL ME SOMETHING	RUFUS	3
6/22	SECRETARY	BETTY WRIGHT	13
6/22	GOOD THINGS DON'T LAST FOREVER	ECSTASY, PASSION	& PAIN 14
6/22	MIDNIGHT & YOU S	OLOMON BURKE	14
6/22	CHASING UP ON YOU	DRAMATICS	30
6/22	LOVE TRAIN (PART I)	BUNNY SIGLER	28
6/29	FEEL LIKE MAKING LOVE	ROBERTA FLACK	1
6/29	HAPPINES IS JUST AROUND THE BEND	MAIN INGREDIENT	7
6/29	KUNG FU	CURTIS MAYFIELD	3
7/6	TIME FOR LIVIN'	SLY & FAMILY ST	ONE 10
7/6	RAINDROPS	BARBARA ACKLIN	14
7/6	FUNKY PARTY	CLARENCE REID	17
7/6	BEST TIME OF MY LIFE	JOE SIMON	15
7/6	WHAT GOES AROUND (COMES AROUND)	BLACK IVORY	44

DATE	SONG	ARTIST POSITION	ACHIEVED
7/6	MAKE UP FOR LOST TIME	MONTCLAIRS	50
7/6	LYING TO MYSELF	DELFONICS	60
7/13	SWEET LADY	MOMENTS	29
7/13	HANG ON IN THERE BABY	JOHNNY BRISTOL	2
7/13	YOUR LOVE IS PARADISE	EXECUTIVE SUITE	37
7/13	KALIMBA STORY	EARTH, WIND & FIRE	6
7/13	DANCE MASTER	WILLIE HENDERSON	18
7/13	YOU'VE GOT TO KEEP ON HUMPIN'	K.G.'S	41
7/13		SOUL SEARCHERS	
7/20		ASHFORD & SIMPSON	37
7/20	CITY IN THE SKY	STAPLE SINGERS	4
7/27	UP FOR THE DOWN STROKE	PARLIMENTS	10
7/27	THAT'S HOW IT GOES	BLOODSTONE	22
7/27	FUNKY MUSIC SHO'NUFF TURNS ME ON	YVONNE FAIR	32
7/27	I FEEL LIKE DYNAMITE	KING FLOYD	35
7/27	NOTHING FROM NOTHING	BILLY PRESTON	8
7/27	DON'T KNOCK MY LOVE	DIANA ROSS & MARV. GAYE	25
7/27	LOVE IS THE MESSAGE	MSFB	42
7/27	BETWEEN HER BOODBYE AND MY HELLO	GLADYS KNIGHT & PIPS	45
8/3	DO IT BABY	MIRACLES	4
8/3	LIVE IT UP PART I	ISLEY BROS.	4
8/3	THEN CAME YOU	DIANNE WARWICK & SPINNERS	2
8/3	YOU BRING OUT THE BEST IN ME	NATURAL FOUR	20
8/3	LET'S PUT IT ALL TOGETHER	STYLISTICS	8
8/3	YOU	BILL WITHERS	15
8/3	TAKE THE TIME TO TELL HER	JERRY BUTLER	46
8/10	MIDNIGHT FLOWER FO	OUR TOPS	5
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DATE	SONG	ARTIST POSITION	ATTAINED
8/10	CAN'T GET ENOUGH OF YOUR LOVE, BABE	BARRY WHITE	1
8/10	DON'T CHANGE HORSES (IN THE MIDDLE OF THE STREAM)	TOWER OF POWER	22
8/10	ON THE VERGE OF GETTING ONE	FUNKADELICS	27
8/10	ALL STRUNG OUT ON YOU	PERSUADERS	32
8/10	I NEED IT JUST AS BAD AS YOU	LAURA LEE	55
8/17	TELL HER LOVE HAS FELT THE NEED	EDDIE KENDRICKS	8
8/17	YOU HAVEN'T DONE NOTHIN'	STEVIE WONDER	1
8/17	IN THE BOTTLE	BROTHER TO BROTHER	9
8/17	AINT NO LOVE IN THE HEART OF THE CITY	BOBBY BLUE BAND	9
8/17	HAPPINESS IS	NEW YORK CITY	20
8/17	DOOR TO YOUR HEART	DRAMATICS	25
8/17	I'M A FOOL FOR YOU	UNDISPUTED TRUTH	39
8/17	SUMMERTIME IN THE CITY	MANHATTANS	45
8/24	SKIN TIGHT	OHIO PLAYERS	2
8/24	DO IT(TILL YOU'RE SATISFIED)	B.T. EXPRESS	1
8/24	SUGAR LUMP	LEON HAYWOOD	35
8/24	HOOKED, HOGTIED & COLLARED	PAUL KELLY	30
8/24	LOVE MAKES IT RIGHT	SOUL CHILDREN	47
8/24	I REALLY GOT IT BAD FOR YOU	PERSUASIONS	56
8/24	THE PLAYER (PART I)	FIRST CHOICE	7
8/31	VIRGIN MAN	SMOKEY ROBINSON	12
8/31	DO I NEED YOU	ANN PEEBLES	57
8/31	LET'S MAKE LOVE AT HOME SOMETIMES	ESCORTS	58
8/31	YOU GOT TO BE THE ONE	CHI-LITES	15
8/31	FEAR NO EVIL	THE MISSION	
9/7	PAPA DON'T TAKE NO MESS (PART I)	JAMES BROWN	1
9/7	CAREFUL MAN	JOHN EDWARDS	8

251a SONG ARTIST POSITION ATTAINED DATE HELL OF A FIX MARION JARVIS 9/7 26 23 9/7 **BLACKBYRDS** DO IT FLUID KOOL & THE GANG 1 HIGHER PLANE 9/7 20 9/7 DON'T SEND NOBODY ELSE ACE SPECTRUM AIN'T NOTHING LIKE THE REAL THING ARETHA FRANKLIN 9/7 SYL JOHNSON 9/7 LET YOURSELF GO BLOOD IS THICKER THAN WATER WILLIAM DE VAUGHN 10 9/14 LITTLE BEAVER 2 PARTY DOWN 9/14 ROCK ME AGAIN & AGAIN ETC. LYN COLLINS 53 9/14 59 THERE'S FEVER IN THE FUNKHOUSE GENERAL CROOK 9/14 27 HAPPINESS IS BEING WITH YOU TYRONNE DAVIS 9/14 20 THE TYMES 9/14 YOU LITTLE TRUST MAKER 50 MARGIE ALEXANDER KEEP ON SEARCHING 9/21 LET'S STRAIGHTEN IT OUT LATIMORE 1 9/21 I WASH MY HANDS OF THE WHOLE 9/21 46 NEW BIRTH DAMN DEAL 51 9/21 BETCHA IF YOU CHECK IT OUT QUADRAPHONICS 18 LEARNING TO LOVE YOU WAS EASY DELLS 9/21 7 LET THIS BE A LESSON TO YOU INDEPENDENTS 9/21 28 MOMENTS 9/28 WHAT'S YOUR NAME I SHOT THE SHERIFF ERIC CLAPTON 33 9/28 CARL CARLTON 11 9/28 EVERLASTING LOVE IKE & TINA TURNER 29 SEXY JDA (PART TWO) 9/28 50 KEEP ON STEPPIN' FALBACK BAND 9/28 EXSTASY, PASSION & PAIN 19 10/5 ASK ME 10 **JONESES** SUGAR PIE GUY (PARTS 1 & 2) 10/5 38 JOHNNY NASH YOU CAN'T GO HALF WAY 10/5 23 EARTH, WIND & FIRE DEVOTION 10/5 SPINNERS LOVE DON'T LOVE NOBODY

10/5

252a

DATE	SONG	ARTIST	POSITION ATTAINED
10/5	SOMETHINGS MIGHTY MIGHTY WRONG	IMPRESSIONS	28
10/5	YOU WERE RIGHT ON TIME	RIPPLE	51
10/5	HEY, POKEY-A-WAY	METERS	31
10/12	SHA-LA-LA (MAKE ME HAPPY)	AL GREEN	2
10/12	SHE'S GONE	TAVARES	1
10/12	WORN OUT BROKEN HEART	SAM DEER	15
10/12	DISTANT LOVER	MARVIN GAYE	12
10/12	SHOE-SHOE SHINE	DYNAMIC SUPERIO	ORS 16
10/12	I KEEP ON LOVIN' YOU	Z Z HILL	39
10/12	EBONY PRINCESS	J.BRISCOE & LISBEAVERS	TTLE 59
10/12	WOMAN TO WOMAN	SHIRLEY BROWN	1
10/19	IT'S SEPTEMBER	JOHNNY TAYLOR	26
10/19	I CAN'T LEAVE YOU ALONE	GEORGE McCRAE	10
10/19	THREE RING CIRCUS	BLUE MAGIC	5
10/19		MIGHTY CLOUDS	OF JOY 32
10/19	PHILADELPHIA	B.B. KING	19
10/19	LA LA PEACE SONG	AL WILSON	19
10/19	LA LA PEACE SONG	O.C. SMITH	27
10/19	I FEEL A SONG(IN MY HEAD)	GLADYS KNIGHT	PIPS 1
10/26	YOU GOT THE LOVE	RUFUS FEATURING CHAKA KHVA	3 1
10/26	WHEN WILL I SEE YOU AGAIN	THREE DEGREES	4
10/26	LOOSE BOOTY	SLY & FAMILY S	IONE 22
10/26	ROCKIN' SOUL	HUES CORPORATION	ON 6
11/2	I DON'T KNOW	BOBBY WOMACK	18
11/2	A NICE GIRL LIKE YOU	INTRUDERS	21
11/2	BE TRUTHFUL TO ME	BILLY PAUL	37
11/2	HEAVY FALLIN' OUT	STYLISTICS	4

	DATE	SONG	ARTIST POSITION	ATTAINED
	11/2	WHATEVER YOU GO, I WANT	JACKSON 5	3
	11/9	WHERE ARE ALL MY FRIENDS	HAROLD MELVIN AND BLUENOTES	8
	11/9	PARTY FREAKS	MIAMI FEATURING ROBERT MOORE	51
	11/9	EVERYBODY'S GOT TO GIVE IT UP	ASHFORD & SIMPSON	53
	11/16	SWEET EXORCIST	CURTIS MAYFIELD	32
	11/16	I'LL BE YOUR EVERYTHING	PERCY SLEDGE	15
	11/16	FUNKY PRESIDENT	PEOPLE IT'S GOD	4
	11/16	STREETRUNNNER	NANCY WILSON	46
	11/16	WAKE UP & START STANDING	YOUNGHEARTS	48
	11/16	KUNG FU FIGHTING MAN	CARL DOUGLAS	1
	11/16	WORDS (ARE IMPOSSIBLE)	MARGIE JOSEPH	27
	11/23	YOU'RE THE FIRST, THE LAST MY EVERYTHING	BARRY WHITE	1
	11/23	I FEEL SANCTIFIED	COMMODORES	12
	11/23	SHOORAH! SHOORAH!	BETTY WRIGHT	33
	11/23	BOOGIE ON REGGAE WOMAN	STEVIE WONDER	1
	11/23	I'VE GOT TO SEE YOU TONIGHT	TIMMIE THOMAS	31
	11/23	LONELINESS HAD GOT A HOLD ON ME/ I COULD LOVE YOU FOREVER		48 .
	11/23	LET ME BACK IN	LITTLE MILTON	38
	11/23	LONG AS HE TAKES CARE OF HOME	CANDI STATON	6
	11/23	WALK OUT OF THE DOOR IF YOU WANNA	YVONNE FAIR	60
?	11/23	WITHOUT LOVE	ARETHA FRANKLIN	6
	11/30	DON'T TAKE YOUR LOVE FROM ME ~	MANHATTANS	7
	11/30	YOU AND I	JOHNNY BRISTOL	20
		I WOULDN'T TREAT A DOG (THE WAY YOU TREAT ME)	BOBBY BLUE BAND	3
	11/30	RELEASE YOURSELF	GRAHAM CENTRAL STA.	56

-12-254a

DATE	SONG	ARTIST		
11/30	PALM GREASE	HERBIE HANCOCK	•	45
11/30	JUICE IT UP PART 2	HOT LINE	•	47
11/30	WHAT MORE CAN A GIRL ASK FOR			60
12/7	FROM HIS WOMAN TO YOU	BARBARA MASON		3
	LOOK ON THE GOOD SIDE			43
12/7	CALIFORNIA MY WAY	MAIN INGREDIENT	r	48
12/7	I ENJOY LOVING YOU	SIDNEY JOE QUA	LIS	47
	I BELONG TO YOU			1
12/7	PLAYING ON YOU	JERRY BUTLER		33
	KEEP SMILIN'			46
12/7	UM, UM, UM, UM, UM	MAJOR LANCE		60
12/7	DO YOUR THING	J. & B. PURIFY		30
12/14	HEARTBREAK ROAD	BILL WITHERS		13
12/14	PICK UP THE PIECES	AVERAGE WHITE	BAND	5
12/14	LET ME START TONITE	LAMONT DOZIER		4
12/14	ONE TEAR	EDDIE KENDRICK	S	8
	BABY HANG UP THE PHONE			18
12/14	I AM YOUR LEADER	WALTER HEATH		51
12/21		SMOKEY ROBINSO		6
12/21	I CAN'T MAKE IT WITHOUT YOU	TYRONNE DAVIS		38
12/21	FIRE	OHIO PLAYERS	÷	1
12/21	DOCTOR'S ORDERS	CAROL DOUGLAS		9
12/21	GUILTY	FIRST CHOICE		19
12/21	BABY YOU KNOW (I'M GONNA MISS YOU) PART I	MONTCLAIRS		40
12/21	MASTER PLAN	KAY GEES		60
12/28	RHYME TYME PEOPLE	KOOK & THE GAN	G	3
12/28	MY MAIN MAN	STAPLE SINGERS		18

		5	
	-13- 255 <b>a</b>		
DATE	SONG	ARTIST POSITI	ON ATTAINED
12/28	STRUTTIN'	BILLY PRESTON	11
12/28	MIDNIGHT SKY (PART I)	ISLEY BROTHERS	8
12/28	LET YOUR LOVE COME DOWN (LET IT FALL ONE ME)	PAUL KELLY	55
12/28	BELIEVE HALF OF WHAT YOU SEE (AND NONE OF WHAT YOU HEAR)	LEON HAYWOOD	21
12/28	HAPPY PEOPLE	TEMPTATIONS	1
12/28	MAN TO WOMAN	LONNIE YOUNGBLOOD	39

## PERTAINING TO THE SONGS THAT REACHED POSITION # 61

- Of the 324 songs that reached position # 61, 245 of them went top 40: that is 75.6 % or 76 % of the songs.
- 2. Of the 324 songs that reached position # 61, 209 of them went top 30: that is 64.5 % or 65 % of the songs.
- 3. Of the 324 songs that reached position # 61, 166 of them went .

  top 20: that is 51.2 % or 51 % of the songs.
- 4. Of the 324 songs that reached position # 61, 110 of them went top 10: that is 33.9% or 34 % of the songs.
- 5. Of the 324 songs that reached position # 61, 69 of them went top 5: that is 21.3% or 21 % of the songs.
- 6. Of the 324 songs that reached position # 61, 31 of them went to  $\frac{1}{2}$  that is 9.6 % or  $\frac{10}{2}$  of the songs .
- 7. The average position for 324 songs was : # 23.8 or 24.

## 257a HOT SOUL SINGLES

1/5/74 LIST # -

WEEL	K SONG	ARTIST		Date
1	IF ITS IN YOU TO DO WRONG	IMPRESSIONS	26	1-5-74
2	GETTING TOGETHER	BROTHERS GUIDING LIGHT	61	1-12-74
.3	WE'RE GETTING CARELESS WITH OUR LOVE	JOHNNIE TAYLOR	5	1-19-74
4	FUNKY MUSIC, Pt. 1	THOMAS EAST	52	1-26-74
5	IF THAT'S THE WAY YOU WANT IT	SKY LARK	55	2-2-74
. 6	THANK'S FOR SAVING MY LIFE	BILLY PAUL	9	2-9-74
7	SAME BEAT	FRED WESLEY & JB's	26	2-6-74
8	SOUND YOUR FUNKY HORN	KC & SUNSHINE JUNKTANOO BAND	21	2-23-74
9	TALK TO THE RAIN	SPRING	55	3-2-74
10	SHE CALLS ME BABY	J. KELLY & PREMIERS	46	3-9-74
11	LOVING YOU .	JOHNNY NASH	40 - :	3-16-74
12	THROUGH THE LOVE IN MY HEART	SYLVERS	50	3-23-74
13	SUMMER BREEZE (PART I)	ESLEY BROTHERS	10	3-30-74
14	BE THANKFUL FOR WHAT YOU GOT	WILLIAM de VAUGHN	1	4-6-74
15	THAT'S HOW HEARTACHES ARE MADE	JERRY BUTLER	58	4-13-74
16	SEXY MAMMA	MOMENTS	3	4-20-74
17	HOLLYWOOD SWINGING	KOOK & THE GANG	1	4-27-74
18	SHE CALLS ME BABY	J. KELLY & PREMIERS	46	5-4-74
19	TIME WILL TELL	TOWER OF POWER	27	5-11-74
20	COME DOWN TO EARTH	NEW CENSATION	61	5-18-74
21	DISRESPECT CAN WRECK	ESCORTS	61	5-25-74
22	POSITIVE THING	MANDRILL	29	6-1-74
23	HOW DO YOU FEEL THE MORNING FTER?	WILLIE JACKSON	11	6-8-74
2,4	DAMN RIGHT I'M SOMEBODY	FRED WESLEY & JB's	32	6-15-74
·25	LOVE TRAIN (PART I)	BUNNY SIGLER	28	6-22-74

## BEST COPY AVAILABLE

WEE	K SONG	ARTIST		DATE
26	BINGO	WHISPERS	40	6-29-74
27	HELP YOURSELF	THE UNDISPUTED TRUTH	19	7-6-74
28	DANCING MACHINE	JACKSON 5	1	7-13-74
29	BEHIND CLOSED DOORS	LITTLE MILTON	31	7-20-74
30	BETWEEN HER GOODBYE & MY HELLO	GLADYS KNIGHT AND THE PIPS	45	7-27-74
31	TAKE THE TIME TO TELL HER	JERRY BUTLER	46	8-3-74
32	I NEED IT JUST AS BAD AS YOU	LAURA LEE	55	2-10-74
33	SUMMERTIME IN THE CITY	MANHATTANS	45	8-17-74
34	DON'T FIGHT THE FEELING	SOUND EXPERIENCE	61	8-24-74
<b>3</b> 5	FEAR NO EVIL	THE MISSION	61	8-31-74
36	I REALLY GOT IT BAD FOR YOU	PERSUASIONS	56	9-7-74
37	YOU LITTLE TRUST MAKER .	THE TYMES	20	9-14-74
38	KEEP ON SEARCHING	MARGIE ALEXANDER	50	9-21-74
39	KEEP ON STEPPIN'	FASTBACK BAND	50	9-28-74
40	HEY POKEY-A-WAY	METERS	31	10-5-74
41	BETCHA IF YOU CHECK IT OUT	QUADROPHONICS	51	10-12-74
42	IT'S SEPTEMBER	JOHNNIE TAYLOR	26	10-19-74
43	I SHOT THE SHERRIF	ERIC CLAPTON	33	10-26-74
44	WHATEVER YOU GOT I WANT	JACKSON FIVE	3	11-2-74
45	EVERYBODY'S GOT TO GIVE IT UP	ASHFORD & SIMPSON	53	11-9-74
46	WORDS (ARE IMPOSSIBLE)	MARGIE JOSEPH	27	11-16-74
47	WITHOUT LOVE	ARETHA FRANKLIN	1	11-23-74
48	GANGSTER BOOGIE BUMP	WILLIE HENDERSON	50	11-30-74
<b>4</b> 9	DO YOUR THING	JAMES & BOBBY PURIS	Y 20	12-7-74
50	I AM YOUR LEADER	WALTER HEATH	51	12-14-74
<b>i1</b>	I AM YOUR LEADER	WALTER HEATH	51	12-21-74
2	MAN TO WOMAN	LONNIE YOUNG HOOD	39	12-28-74

PLAINTIFF'S EXHIBIT 64 - PURCHASE AGREEMENT BETWEEN FAMOUS MUSIC CORPORATION AND ABC RECORDS, INC. DATED JULY 31, 1974

PURCHASE AGREEMENT (pp. 2590-2830)

AGREEMENT dated as of July 31, 1974 by and between FAMOUS MUSIC CORPORATION, a Delaware corporation ("Seller"), and ABC RECORDS, INC., a New York corporation ("Buyer"), pursuant to which Buyer is acquiring substantially all of the assets, properties, business and goodwill of the phonograph record operations of Seller and Seller's capital stock of its subsidiary, Blue Thumb Records, Inc., a California corporation, both of which are engaged in the phonograph record business. 'such record operations being more fully defined on Schedule I attached hereto and being hereafter referred collectively as "Record Assets"), all upon the terms and subject to the conditions hereinafter set forth.

NOW THEREFORE, in consideration of the premises and mutual covenants and agreements hereinafter set forth, the parties hereto hereby agree as follows:

#### 1. TRANSFER OF ASSETS AND RELATED TRANSACTIONS

1.1 Transfer of Assets. On the terms and subject to the conditions of this Agreement, the Seller will, and does hereby, sell, convey, assign, transfer and deliver to the Buyer all of the Record Assets of the Seller as the same existed on July 31, 1974, and including without limitation those assets set forth on the combined balance sheet dated June 25, 1974 attached hereto as Exhibit "A", as later adjusted to July 31, 1974 to

reflect those transactions of Seller undertaken in the ordinary course of business. Seller shall furnish Buyer, as soon a, it is available, a copy of a balance sheet covering the assets herein being conveyed and liabilities herein being assumed, prepared in accordance with generally accepted accounting principles consistently applied.

- 1.2 Instruments of Conveyance and Transfer. The Seller will deliver to the Buyer (a) such quitclaim deeds, bills of sale, endorsements, assignments and other good and sufficient instruments of conveyance and transfer as will be effective to vest in the Buyer all of the Seller's right, title and interest in and to the Record Assets, properties and business to be sold, conveyed, transferred and delivered hereunder, subject to the liabilities and obligations assumed by the Buyer under the terms of this Agreement and (b) all of the Seller's contracts and commitments, books, records and data relating to the assets, properties, business and operations being sold. Simultaneously with such delivery, the Seller will take all steps as may be requisite to put the Buyer in possession and operating control of the assets, properties and business being sold hereunder by Schler. All transfers will be without warranty except as provided in Subsection 4.1 hereof.
  - 1.3 Agreement on Consents. The Seller will, and does hereby, (i) with respect to all agreements relating to the Record Assets to which Seller is a party, assign to the Buyer

all such agreements; (ii) with respect to all such agreements which may not be assigned without the consent of a third party thereto, cooperate with the Buyer to procure the consent of such party to an assignment to the Buyer of such agreement to permit the Buyer to obtain the full enjoyment of all of the rights of Seller under such agreement; provided, however, that the Seller will not be obligated to assign any such agreement, or any other agreement, sales order or purchase order or any claim or right or any benefit arising thereunder or resulting therefrom if an attempted assignment thereof, without the consent of a third party thereto, would constitute a breach thereof or in any way affect the rights of the Buyer or the Seller thereunder. If such consent is not obtained, or if an attempted assignment thereof would be ineffec ive or would affect the rights of the Seller thereunder so that the Buyer would not in fact receive all rights under such agreement, the Seller will cooperate with the Buyer in any arrangement necessary to provide the Buyer with the benefits under such agreement, including enforcement at the cost and for the benefit of the Buyer of any and all rights of the Seller against a third party thereto arising out of the breach or cancellation by such third party or otherwise. Any transfer or assignment to the Buyer by the Seller of any property or property rights of any agreement which requires the consent or approval of any third party will be made subject to obtaining such consent or approval.

## 2. CONSIDERATION FOR TRANSFER OF ASSETS

In full consideration of the aforesaid sale, conveyance, transfer and delivery, and subject to the terms and conditions of the Agreement:

- (a) The Buyer will pay the Seller the sum of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) as the purchase price hereunder, payable as follows:
  - (i) Two Hundred Fifty Thousand Dollars (\$250,000.00) on the signing of this Agreement; and
  - (ii) The remainder of Two Million Two Hundred Fifty
    Thousand Dollars (\$2,250,000.00) within five days from the
    date hereof.
- (b) The Buyer will, and does hereby, assume and agree to pay as the same will become due all of the liabilities and obligations of Seller disclosed on the Balance Sheet, Exhibit "A" hereto, the summaries furnished in support thereof, the actual contracts, agreements and other documents delivered to Buyer, including but not limited to the mechanical licenses, collective bargaining agreements with the American Federation of Musicians and American Federation of Television and Radio Artists, the AFM Special Payments Fund and Music Performance Trust Fund and all similar union pension and welfare funds, and which are outstanding on July 31, 1974, any additional liabilities incurred in the ordinary course of business up to July 31, 1974, and all other liabilities, obligations and commitments of Seller and its subsidiaries relating to the Record Assets and which are

outstanding on July 31, 1974, except as provided in Paragraph 4.1 hereof and except that the Buyer will and does not assume or agree to pay any liabilities of Seller in respect of the publishing business not being conveyed by Seller or acquired by Buyer. \*\* INSERT PAGES SA and 56.

- (c) The Buyer will indemnify and hold harmless the Seller, Paramount Pictures Corporation, Gulf & Western Industries ("G&W") and their affiliates (the "Affiliates") from:
  - (i) all liabilities of any of the foregoing resulting from any breach by the Buyer of any of its obligations under this Agreement; and
  - (ii) all reasonable attorneys' fees incurred in .
    connection with any action, suit or proceeding incident
    to any of the matters indemnified against in this Section.
- (d) Buyer shall not be responsible for or assume any obligations of Seller under pension or profit sharing plans or any other type of employee benefit arrangement, including collective bargaining agreements except as otherwise herein expressly provided. Buyer shall be responsible only in respect of the four employment contracts identified on Schedule II, effects.

  3. CLOSING

The Closing of the transactions contemplated by Sections 1 and 2 of this Agreement will take place at Los Angeles on August 1, 1974 but as of July 31, 1974. The date and time of the Closing is herein referred to as the "Closing Date."

Provided, however, Buyer shall not assume and be obligated to pay any trade accounts payable, artist's or other royalties payable in respect of sales of records prior to the closing. accrued expenses, long term liabilities, California Sales and Use Tax obligations relating to the acquisition of master recordings by the Seller's record operations or money judgments rendered in litigation commenced on or before July 31, 1974, in excess of \$500,000 in the aggregate above the amount of such liabilities shown on the balance sheet attached hereto, as the same are adjusted to the Closing Date to reflect transactions in the ordinary course of business prior to the Closing Date. n regard to such excess amounts Seller covenants and agrees to pay such amounts or promptly reimburse Buyer for the payments In the event Buyer wishes to settle such litigation, thereof. and Seller approves the proposed terms of settlement, the amount paid pursuant to an approval settlement may be included in the aggregate amount of such excess. If a proposed settlement is disapproved by Seller, and a subsequent budget is rendered in excess of the settlement amount, then Seller will reimburse Buyer for the excess over the proposed settlement amount and only the amount of proposed settlement shall be included in the aggregate amount of such excess. If Seller is able to effectuate a settlement of any such litigation, it may propose and recommend such settlement to Buyer. In such event only the settlement amount so recommended may be included in the aggregate amount irrespective of whether the settlement is in fact effected or a judgment in excess of the settlement amount is rendered.

In the event that there is any undisclosed existing litigation or claims, in writing, in which suits are filed within six months of the closing date, not revealed to Buyer, Seller shall be responsible for any judgments rendered in connection therewith and for the costs and expenses of the defense thereof.

#### 4. REPRESENTATION AND WARRANTIES

- 4.1 Representations and Warranties of the Seller.

  The Seller warrants to the Buyer as follows:
- (a) The Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has full power and authority to enter into this Agreement and perform its obligations hereunder, and all corporate and other proceedings required to be taken by it to authorize Seller to enter into this Agreement have been duly and properly taken.
- (b) The execution, delivery and performance of this Agreement by the Seller and consummation of the transactions contemplated hereby will not violate any provisions of law applicable to Seller to the best of Seller's knowledge.
- (c) The Seller will execute and deliver whatever documents are necessary to convey to the Buyer whatever title the Seller may have to the assets being transferred hereunder.
- (d) Neither the Seller nor G&W has created or has caused to be created, at their direction, any liens or encumbrances with respect to the assets being transferred hereunder, other than those shown on the books and records of Seller as of the date hereof.
  - 4.2 Representations and Warranties of the Buyer.

    The Buyer warrants to the Seller as follows:
- (a) The Buyer is a corporation duly organized, validly existing and in good standing under the laws of the

State of New York and has full power and authority to enter into this Agreement and perform its obligations hereunder, and all corporate and other proceedings required to be taken by it to authorize Buyer to enter into this Agreement have been duly and properly taken.

- (b) The execution, delivery and performance of this Agreement by the Buyer and consummation of the transactions contemplated hereby will not violate any provision of law applicable to Buyer to the best of Buyer's knowledge.
- (c) The Buyer will execute and deliver whatever documents are necessary to effect the assumption of the liabilities of the Seller being assumed by it hereunder.

#### 5. TRANSACTIONS PRIOR TO CLOSING.

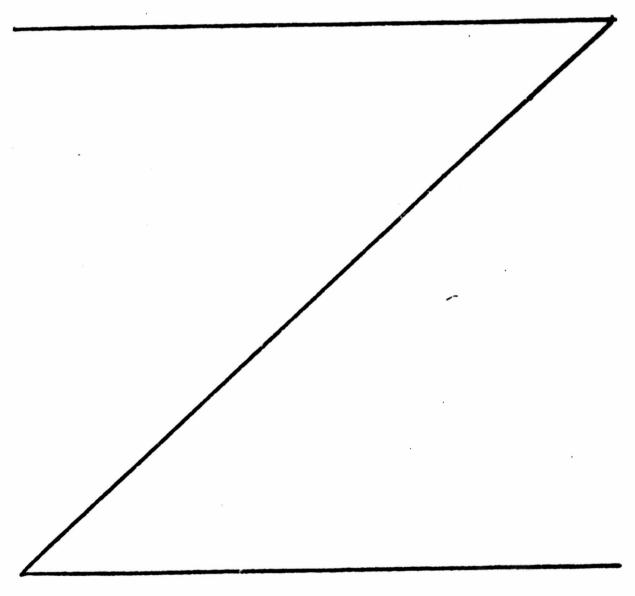
- 5.1 Access to Information Concerning Properties. The Buyer acknowledges that its officers or agents have been given full access to all of the properties, records, contracts relating to the recording operations of the Seller.
- 5.2 Conduct of Business Pending the Closing Date. The Seller hereby agrees that between the date of Exhibit "A" and the Closing Date and except as otherwise consented to by the Buyer in writing:
- (a) The Seller (i) has not sold any of the Record
  Assets being transferred hereunder except for sales by Seller
  in the ordinary course of business, and (ii) has not created
  any liens or encumbrances on any of the Record Assets being
  transferred hereunder.

- (b) The Seller will cooperate with the Buyer to obtain all consents necessary to consummate the transactions provided for herein, it being understood that the transactions contemplated by this Agreement are not conditioned upon or subject to the obtaining of such consents.
- insurance upon all of the Record Assets of Seller and with respect to the conduct of the recording operations of Seller in such amounts and of such kinds comparable to that in effect on the date of this Agreement.

#### 6. OPINIONS OF COUNSEL.

- (a) At the Closing, Buyer will deliver an opinion of Lee Young, Jr., counsel for the Buyer, satisfactory in form and substance to the Seller and its counsel, to the effect that all necessary proceedings to authorize the execution and delivery of this Agreement by the Buyer and performance by the Buyer of its obligations hereunder have been taken and that this Agreement has been duly authorized, executed and delivered by the Buyer and constitutes a legal, valid and binding obligation of Buyer, enforceable against it in accordance with its terms.
- (b) At the Closing, Seller will deliver an opinion of Robert L. Jones, counsel for Seller, dated the Closing Date, satisfactory in form and substance to the Buyer and its counsel, to the effect that:

execution and delivery of this Agreement by the Seller and the performance by the Seller of its obligations hereunder have been taken, and that this Agreement has been duly authorized, executed and delivered by the Seller and constitutes the legal, valid and binding obligation of the Seller, enforceable against



the Seller in accordance with its terms;

- assignment and transfer delivered by the Seller to the Buyer have been duly executed and delivered, are legal, valid and enforceable against the Seller in accordance with their terms, and have vested in the Buyer all right, title and interest of the Seller in all of the assets and properties conveyed thereunder subject to obtaining necessary consents in accordance with Section 1.3 hereof;
- (3) so far as known to such counsel, the execution, delivery and performance of this Agreement by the Seller does not violate any provision of law applicable to the Seller; and
- (4) so far as known to such counsel, the assets being transferred to the Buyer hereunder are subject to no liens or encumbrances other than as set forth on the Financial Statement.

## 7. TRANSACTIONS SUBSEQUENT TO CLOSING

(a) <u>Use of Name</u>. The Buyer will take whatever action is necessary to eliminate the use of the Gulf & Western Industries, Inc. name, the Paramount Pictures name, the Famous Music name, together with their respective trademarks and logos, as to all the assets conveyed and from all transactions entered into by Buyer after the Closing Date except as may be permitted by any license agreements entered into between Buyer and Paramount under separate agreement.

- (b) Additional Documents of the Seller. The Seller will from time to time execute and deliver to the Buyer such additional documents as may be necessary for the transfer or conv rance of all the assets being transferred to the Buyer hereunder.
- (c) Further Assurances. From time to time after the Closing Date, the Buyer will make available to the Seller any records, documents or data in its possession which the Seller may reasonably require in order to prepare any necessary tax returns or other reports re uired of it as to the assets being conveyed and to defend and prepare for the defense of any claims asserted against it or its affiliates concerning said assets and operations.

### 8. INDEMNIFICATION AND SETTLEMENT OF CLAIMS

- 8.1 <u>Indemnification by the Seller</u>. The Seller agrees to indemnify and hold the Buyer harmless against and in respect of the following:
- (a) Any lien created by the Seller and not reflected on the books as of July 31, 1974.
- (b) All reasonable costs incurred by the Buyer in connection with any action, suit or proceeding incident to any of the matters indemnified against in this Section 8.1. Seller may engage counsel of its own choosing to represent Buyer in any such matter, and Buyer agrees to cooperate with such counsel.

- (d) Seller and G + W agree that subsequent to the closing date they, or either of them, either by themselves, or in joint venture with others, will not engage in the recording business for a period of one year. Seller and G + W further agree that for a period of one year from the closing date they, or either of them, shall not directly or indirectly engage in the record business using the name or trademark "Paramount", or allow others to use such name in connection with phonograph records or tapes. Provided, however, Seller may at any time release or cause the release of sound track records and tapes utilizing the Paramount name and trade mark.
- (e) Buyer shall have the right of first negotiation in connection with any sound track albums controlled by Seller, G + W or Paramount Pictures Corporation for a period of five years from and after the closing date.

- 8.2 Indemnification by the Buyer. The Buyer agrees to indemnify and hold the Seller, G & W and its Affiliates harmless against and in respect of the following:
- (a) All liabilities and claims of any kind, whether express or implied, relating to Seller and the assets being conveyed hereunder, except for those expressly not assumed by the Buy ander the provisions of Section 2(b) hereof.
- (b) All liabilities and claims of any kind, whether express or implied, relating to the Purchase Agreement, all as more fully set forth in Section 2(c) hereof.

#### 9. MISCELLANEOUS

- 9.1 Bulk Sales Law. The Buyer hereby waives compliance by the Seller with the provisions of the Bulk Sales Law of any state.
- 9.2 Sales and Use Taxes. Any sales or use tax under the laws of the United States or any state or political subdivision thereof which may be payable by reason of the transactions consummated pursuant to this Agreement and any recording or filing fees incurred by either party hereto in connection with the transfer of title to property received hereunder will be payable by the Buyer. The Buyer agrees to reimburse the Seller, on request, for any such taxes or fees required to be paid and actually expended by Seller.
- 9.3 No Brokerage. Each party hereto represents and warrants to the other party hereto that it has not incurred any obligation or liability, contingent or otherwise, for

brokerage or finder's fees or agent's commission or other
like payment in connection with this Agreement or the transactions contemplated hereby and agrees to indemnify and hold
the other party hereto harmless against and in respect of
any such obligation or liability based in any way on agreements, arrangements or understandings claimed to have been
made by such party with any third party.

- 9.4 <u>Survival of Representations and Warranties</u>. The parties hereto covenant and agree that the representations and warranties contained in this Agreement or in any document delivered in connection with the Closing hereunder will survive the Closing Date hereunder.
- 9.5 <u>Waivers</u>. Any party to this Agreement may, at any time by written notice to the other, (a) extend the time for the performance of any of the obligations or other actions of any other party; (b) waive any inaccuracies in the representations or warranties of any other party contained in this Agreement or in any document delivered pursuant to this Agreement; (c) waive any conditions precedent to it, obligations hereunder or compliance with any of the c venants of any other party contained in this Agreement; and (d) waive or modify performance of any of the obligations of any party. No action taken pursuant to this Agreement including, without limitation, any investigation by or on behalf of any party, will be deemed to constitute a waiver by the party taking such action of compliance with any representations, warranties,

covenants or agreements contained herein. The waiver by any party hereto of a breach of any provisions of this Agreement will not operate or be construed as a waiver of any subsequent breach.

- 9.6 Expenses. Whether or not the transactions contemplated by this Agreement are consummated, each of the parties hereto will pay the fees and expenses of its counsel, accountants and other experts and all of its other expenses incident to the negotiation, preparation and execution of this Agreement and the consummation of the transactions contemplated hereby.
- 9.7 Notices. All notices, requests, demands and other communications which are required or may be given under this Agreement will be in writing and will be deemed to have been duly given if delivered personally or mailed, by registered or certified mail, return receipt requested:
  - (a) If to Seller, to:

Paramount Pictures Corporation 1 Gulf & Western Plaza New York, New York 10025 Attention: Art Barron

With a copy to:

Robert L. Jones, Esq.
Gulf & Western Industries Inc.
1 Gulf & Western Plaza
New York, New York 10023

(b) If to Buyer to:

\*\* INSERT PAGE 15a

#### (b) If to BUYER, to:

ABC Records, Inc.
8255 Beverly Boulevard
Los Angeles, California 90048
Attention: Jay H. Lasker, President

With a copy to:

Lee Young, Jr.
ABC Records, Inc.
8255 Beverly Boulevard
Los Angeles, California 90048

And another copy to:

I. Martin Pompadur, Vice President American Broadcasting Companies, Inc. 1330 Avenue of the Americas New York, New York 10019 277a

or to such other address as any party will have specified by notice in writing to each of the other parties.

- 9.8 Entire Agreement. This Agreement and all Closing papers furnished hereunder constitute the entire agreement between the parties hereto and supersede all prior agreements and understandings, oral and written, between the parties hereto with respect to the subject matter hereof.
- 9.9 Binding Effect, Benefits. This Agreement will inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns; nothing in this Agreement, express or implied, is intended to confer on any other person other than the parties hereto or their respective successors and assigns, any rights, remedies, obligations and liabilities under or by reason of this Agreement.
- 9.10 Assignability This Agreement will not be assignable by any party hereto without the prior written consent of each of the other parties hereto.
- 9.11 <u>Section and Other Headings</u>. The section and other headings contained in this Agreement are for reference purposes only and will not affect the meaning or interpretation of this Agreement.
  - 9.12 Counterparts. This Agreement may be executed in

any number of counterparts, each of which will be deemed to be an original and all of which together will be deemed to be one and the same instrument.

- 9.13 Neither Seller nor Buyer shall have the right to rescind this Agreement in the event of any breach of any of the conditions or warranties herein contained. The rights of Buyer and Seller, in the event of any such breach, shall be solely an action for damages except to the extent that specific performance or injunctive relief would be applicable, under the particular circumstances.
- 9.14 It is understood and agreed that the stock in Blue Thumb Records, Inc. is socalled "legend" stock and may not be transferred except with the consent of the Commissioner of Corporations of the State of California. Seller will seek such consent and the transfer of stock contemplated hereby is subject to Seller's obtaining same. If consent is denied, Seller will transfer the assets of Blue Thumb Records, Inc. in lieu of stock.
- 9.15 This Agreement shall be construed in accordance with the laws of the State of California.
- 9.16 Seller shall advise Buyer during the 30 day period following the closing date as and when options are to be exercised and/or payments under existing contracts must be made. The failure to provide such information shall not constitute a breach of this Agreement.

279a

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

FAMOUS MUSIC CORPORATION

By Seller"

ABC RECORDS, INC.

By & Mark linger "Buyer"

cluded within the aforesaid merchandise inventory shall be work in progress, for example, phonograph records and album covers in the process of manufacture upon the Closing Date. Buyer shall be solely responsible to the suppliers for the entire process of manufacture of such work in progress for which Seller has not been billed, and shall pay for same upon presentation by Seller

or such suppliers of invoices covering same.

2. (a) All contracts of Seller with musicians and other performers relating to the rendition of services in connection with the manufacture, sale and distribution of phonograph records and the advertising, exploitation thereof (herein called "artist's contracts").

(b) All contracts of Seller with persons, firms and corporations pursuant to which Seller acquired rights to manufacture, sell, distribute and exploit phonograph records derived from master recordings furnished by such persons, firms and corporation, and whether or not Seller acquired ownership of said master recordings (herein called "master purchase/lease contracts").

(c) All other contracts of Seller with persons, firms and corporations pursuant to which Seller acquired rights to record, manufacture, produce, distribute sell, advertise and/or exploit phonograph records, whether domestically or in foreign countries, and whether or not Seller acquired ownership of the phonograph records or of the master recordings from which such phonograph records have been or may be in the future manufactured (herein called "independent production contracts").

3. All contracts with other persons, firms or corporations pursuant to which Seller granted rights or agreed to grant rights to such others to manufacture, produce, distribute, sell, advertise and/or exploit phonograph records manufactured from master recordings owned or controlled by Seller (herein called "Seller's licenses").

4. All of the copyrights, including rights of renewal thereof, which Seller has acquired in master recordings and any phonograph record album covers and related artwork.

- 5. Those master recordings owned or otherwise in the possession or under the control of Seller pursuant to contracts referred to in paragraph 2 of this Schedule I. Said master recordings include both those which have heretofore been utilized in the manufacture of phonograph records released for commercial distribution ("released masters"), and those not yet so utilized ("unreleased masters"). The words "masters" or "master recordings" mean and include all magnetic tapes, matrices, mothers, stampers, metal parts and all other parts and components necessary for the production and manufacture of phonograph records and prerecorded magnetic tapes. All unreleased masters shall be delivered "as is" and all expenses incurred after the Closing Date in the editing, cutting and "mastering" of such unreleased masters shall be the sole responsibility of Buyer.
- 6. All agreements between Seller and the American Federation of Musicians, the Music Performance Trust Fund and Special Payments Fund ("AFM collective bargaining agreements"), and all agreements between Seller and the American Federation of Television and Radio Artists ("AFTRA collective bargaining agreements").
- 7. Lease agreement between Brentwood Intercontinental and Blue Thumb Records, Inc. dated July 23, 1973, covering premises located on the second floor at 11538 San Vicente Boulevard, Los Angeles, California 90049.
- 8. Lease agreement covering premises of Seller in Nashville, Tennessee, a copy of which Seller has furnished to Buyer.

# PRO FORMA BALANCE SHEET As of June 25, 1974

CURRENT ASSETS	•	CURRENT LIABILITIES	
Marketable Securities	\$ 1,000	Trade Accounts Payable	\$ 1,230,466
Trade Accounts Receivable	\$6,718,697	Royalties Payable	1,522,832
Less: Reserve for		Royalties Payable - Other	1,221,484
Returns & Doubtful Accounts	2,855,107	Accrued Expenses & Other Liabilities	162,408
Net Receivables	3,863,590		
Inventory	2,012,175	Total Current Liabilities	4,137,190
Artist Advances	3,940,006		
Prepaid Expenses & Other Current Assets	362,034		
	Acceptance of the second of th		302,632
Total Current Asset	10,178,805	Long-Term Liabilities	
Net Property, Plant & Equipment	126,547	Equity	6,542,7 <b>57</b>
Goodwill	677,227		
Total Assets	\$10,982,579	Total Liabilities & Equity	\$10,982,579

EXHIBIT "A"

2820

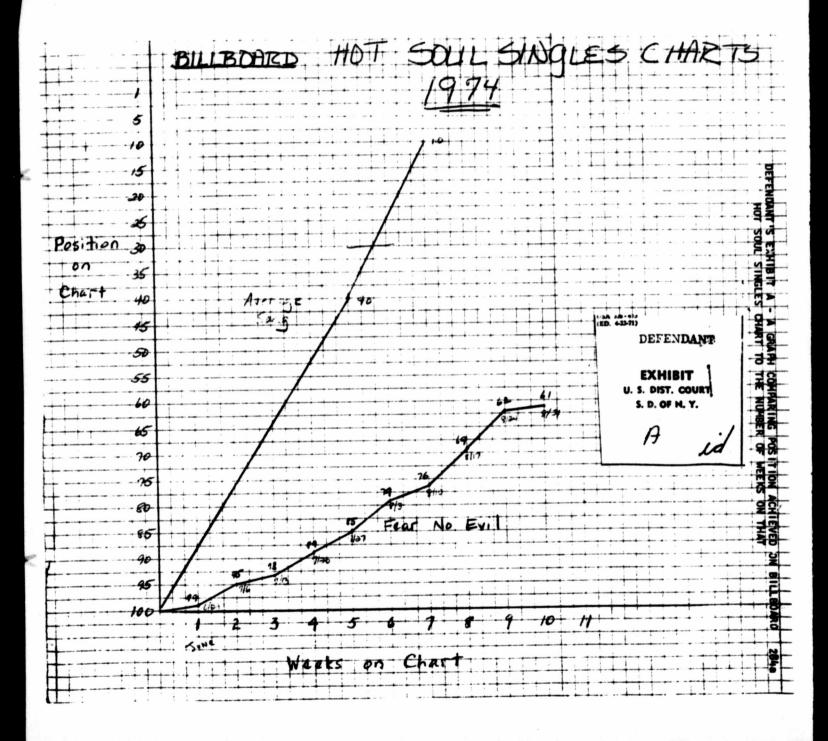
### EXISTING EMPLOYMENT CONTRACTS

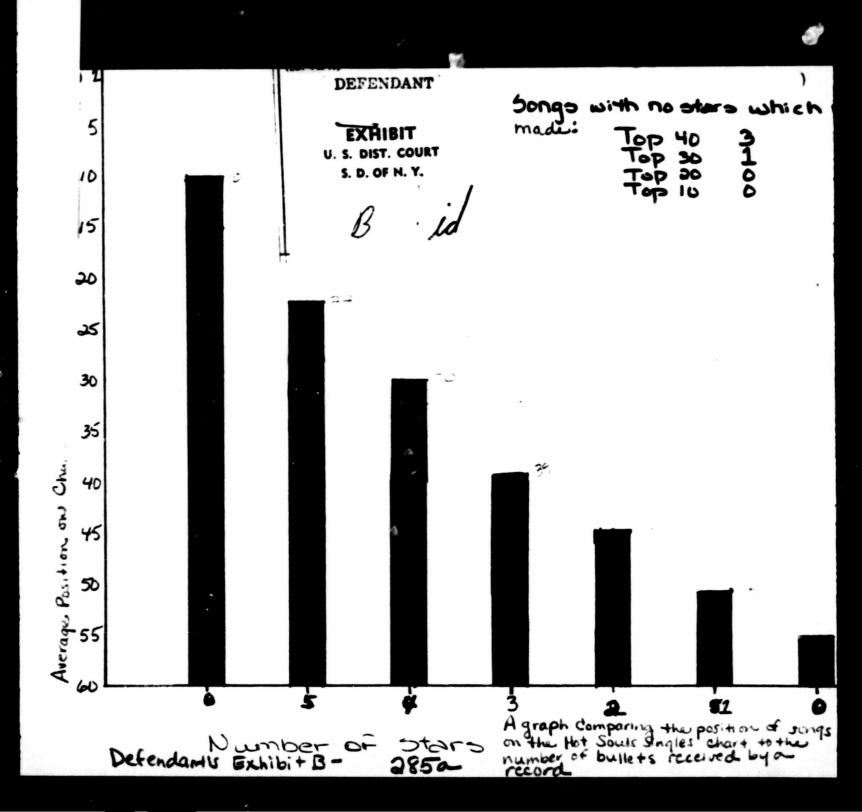
James Foglesong

Tommy Lipuma

Sal Licata

Lawrence S. Baunach





DEFENDANT'S EXHIBIT E - A NEW YORK TIMES REVIEW BY IVE BARNES DATED DECEMBER 2, 1972

Theater: Rock Musical

The Mission's 'Virgin'
Opens at Villageast

#### By CLIVE BARNES

There is a new rock musical in town. It opened last night, officially, at the Villageast, which is the new odd name for the theater on Second Avenue that used to relish and relax in the name of the Fillmore East. The Fillmore East is no more, but the Villageast wishes to join the community.

join the community.

Its first offering was "Virgin," which is described as a rock opera concert by the Mission. The Mission is a group of alienated Roman Catholic priests, who feel, I should have thought with some reason, that the church they nominally belong to is totally out of joint with the times.

Their story is a fascinating one. It is full of church politics and church ritual. Here is a group of Roman Catholic priests who have been rebuked by their seniors — their message is plain and clear. It is put very clearly by one of the leaders of the group, and the musical's originator, the Rev. John O'Reilly.

Rev. John O'Reilly.
Father O'Reilly writes:
"Because of its antiquated laws, organized religion is dying. God is alive. But God's sacred laws have been neg-

The Cast
/IRGIN, a rerk overs concert, by t
Mission. Procless author; John G
Reilly; musical director, Al Dai Mont
ijahiling and projections by Steva Lai
Presented by Joy N. Fuchs and Elli

roung Priest Joe Devilo
roung Sister Derethy Lerner
enscience of Young Priest Jay Pielecki

lected, while man has distorted spirtual celebration into an oppressive set of rules and regulations that he can no longer live with. Did God ever pass laws on priestly celibacy, birth control, Mass on Sunday, or fish on Friday? Real religion is not found in the hierarchy of any church, but lives in the heart of each person. Religion is love, and the ene true church is you and me. To speak about these subjects, I chose song instead of Mass. It's called "Virgin."

This is the message of "Virgin." The message is admirable. It is only the delivery that is a little murky and amateurish. The story is that of a priest who falls in love with a nun and, not unexpectedly, has a few difficulties. This is reasonable enough. But the music is not especially interesting, the staging is not specially good, and the show will appeal most strongly to those who wonder about Roman Catholic priests and their celibacy. I think celibacy is wrong. But I suppose opinions could differ.

## DEFENDANT'S EXHIBIT I - NEW YORK TIMES REVIEW BY DON HECKMAN DATED OCTOBER 20, 1972

THE NEW YORK TIMES

(pp. 287a-288a)

October 20, 1972

ROCK OPERA: 4 PRIESTS PRESENT 'VIRGIN'

By Don Heckman

Only a benign, but unfortunately, short-sighted, faith could have brought a "rock opera" called "Virgin' into Philharmonic Hall for a showcase performance Wednesday night.

Composed by four young priests who are part of a reform group called the Contemporary Mission, "Virgin" was presented as a series of tableau-like scenes, with four principal singers, a chorus of dancers and singers, a rock group, and an on-stage orchestra. The story line--such as it was--dealt with a young priest's attempt to reconcile the dictates of his conscience with the demands of religious custom.

The lyrics that resulted no doubt had special significance for young church people who are attempting to resolve similar contradictions in their own lives. But the Rev. John O'Reilly (the principal writer) and his collaborators failed to bring the problem out of the confines of religious parochialism and into a broader, more meaningful universalism.

The music was no better. Eclectic, slick, well-assembled poprock describes it well enough. But its machine-oiled efficiency had more to say about the pervasive effects of the rock musical style than it did about any special qualities of artistic inspiration.

Considering the costs of a one-shot presentation of this sort, "Virgin" may have to be placed right up there with "Dude" as one of the season's most disastrous show biz outings.

REPRINTED FROM ORIGINAL

DEFENDANT'S EXHIBIT K - AN AGREEMENT DATED NOVEMBER 28, 1972 BETWEEN CONTEMPORARY MISSION, INC. AND Tanious Music FAMOUS MUSIC CORPORATION 1 Guif + Western Plaza

Corporation A GULF + WESTERN COMPANY

AARON W. LEVY VICE PRESIDENT

November 28, 1972

New York, New York 10023

The Contemporary Mission, Inc. 1 Mayapple Road Stamford, Connecticut

Gentlemen:

We are advancing you the sum of \$7,500.00 and you hereby acknowledge receipt of said sum and accept the same upon the following terms and conditions:

- Said sum will be used by you to sustain the running of the stage presentation of "Virgin" at the Villageast Theater in New York City for the balance of the week ending Sunday, December 3, 1972.
- Said sum shall be deemed to constitute a further advance chargeable against any and all royalties accruing to your account of the existing recording and split publishing agreements between us. To the extent that such royalties are not sufficient to repay the said sum, or in the event that "Virgin" shall not run to the end of the current week, the unpaid balance thereof shall constitute a direct obligation of The Contemporary Mission, Inc. to Famous Music Corporation.
- 3. You acknowledge that Famous Music Corporation shall be relieved of its obligation to expend a minimum of \$50,000.00 in the promotion of "Virgin" record sales if, as and when, in the sole opinion of Famous Music Corporation, such promotion shall cease to be effective and profitable.

Yours very truly,

FAMOUS MUSIC CORPORATION

Aaron W. Levy Vice President

ACCEPTED AND AGREED TO:

THE CONTEMPORARY MISSION, INC.

290a DEFENDANT'S EXHIBIT N - AFFIDAVIT OF FATHER ISSACC N. RANEY DATED MAY 22. 1972 UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT THE ROBERT STIGWOOD GROUP LIMITED, et al., 72 Civ. B. 501 Plaintiffs, -against-AFFIDAVIT JOHN T. O'REILLY, et al., Defendants. STATE OF NEW YORK) SS.: COUNTY OF ORANGE FATHER ISSAC N. RANEY being duly sworn deposes and says: I am the Provincial-Superior of the Missionary Society of the Holy Apostles whose headquarters are located at 1300 Newton Street N.E. Washington, D. C. I have read the letter from the Internal Revenue Service to the Contemporary Mission annexed hereto and marked "Exhibit 1". 3. The Contemporary Mission to my knowledge is not now nor has it ever been a part of the Missionary Society of the Holy Apostles. Furthermore, the Contemporary Mission has never been authorized to my knowledge by the Missionary Society of the Holy Apostles to seek exemption from federal taxation on the basis of alleged affiliation with the Society or by use of its tax-identification number. Res Sur Yor Kany 717 Sal Rev. Issac N. Raney M.Ss. A. Sworn to before me this 22nd day of May, 1972. stank L

#### DEFENDANT'S EXHIBIT N-1 - LETTER FROM IRS DATED APRIL 23, 1972 ATTACHED TO RANEY AFFIDAVIT (PP·291a-292a)

Address any reply to. 1114 Market St., St. Louis, Mo. 63101 Paparimonic of the Treasury

> notes entire serious Internal Revenue Service In resily refer to: APR 2 9 WWW F:1:3:37:NUB

The Contemporary Mission 2102 North 13th Street St. Louis, Missouri 63106

Gentlemen:

This is in reference to your application for exemption from Federal income tax as an organization described in section 501(c)(3) of the Internal Rayenue Coda.

Based upon the information submitted, we have concluded that your exemption from Federal income tax is covered by the group ruling issued by our National Office to the National Catholic Welfare Conference. That ruling holds that all agencies, instrumentalities, as well as the educational, charitable and religious institutions operated, supervised or controlled by or in connection with the Roman Catholic Church in the United States, its territories or possessions, appearing in the list of such institutions, contained in the United States Edition of The Official Catholic Directory, are entitled to exemption from Federal income tax under the provisions of section 501(c)(3) of the Internal Revenue Code.

Inasmich as you are an integral part of the operations of the Missionary Society of the Holy Apostles, which is listed in the Official Catholic Directory, you come within the scope of the above-mentioned ruling. Your exempt status will continue as long as the Society's name appears in the Directory submitted annually to our National Office.

Under the National Office Group ruling, contributions made to you are deductible by the donors in computing their taxable income in the manner and to the extent provided by section 170 of the Internal Revenue Code. Likerise, bequests, legacies, devises, transfers or gifts to or for your use are deductible for Federal estate and gift tax purposes under the provisions of sections 2055, 2106 and 2522 of the Code.

It is the policy of the Service not to issue determination lettersto organizations covered by group rulings. Therefore, a separate determination letter will not be sent to you.

BEST COPY AVAILABLE

The Contemporary Mission

If any question arises with respect to your status for Foderal income tax purposes, you may use this letter as evidence of your exemption.

This is an advisory letter.

Very truly yours,

District Director

### COURT OF APPEALS SECOND CIRCUIT

Index No.

CONTEMPEGARY MISSION, INC.,

Plaintiff-Appellee,

- against -

Affidavit of Service by Mail

FAMOUS MUSIC CORP.,

Defendant - Appellant,

and

PARAMOUNT PICTURES, et al., Defendants.

STATE OF NEW YORK. COUNTY OF

SS.:

brief

upon William D. O' Reilly, Esq.

attorney(s) for

plaintiff-appellee

in this action, at 52 Sharon Road Windham, NH 02383

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this

1976

day of November

Bleh A Kirch

BETH A. HIRSH
NOTARY PUBLIC. State of New York
NO. 41 - 4623156
Qualified in Queens County
Commission Expires March 30, 1978

Velma N. Howe